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OPINIONS BELOW

The opinion of the Texas Supreme Court (App., *infra*, 1a-25a) is reported at 49 Tex. Sup. Ct. J. 336, 2006 Tex. LEXIS 97 (Tex. Feb. 3, 2006). The opinion of the Fourteenth Court of Appeals of Texas (App., *infra*, 27a-88a), which was reversed by the Texas Supreme Court's opinion, is reported at 135 S.W.3d 365. The Texas District Court did not issue an opinion but signed an order granting summary judgment on behalf of Respondents. (App., *infra*, 89a-92a).

JURISDICTION

The Texas Supreme Court rendered its judgment and issued its opinion on February 3, 2006. No motion for rehearing was filed. The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the Constitution provides in relevant part that "[T]he Laws of the United States . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

The TCPA makes it illegal to "use any telephone facsimile machines, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C).

Section 227(b)(3) provides a private right of action for violations of this section:

> **Private right of action**. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violations,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> >
> > (C) both such actions.

47 U.S.C. § 227(b)(3).

The federal residual limitations statute, 28 U.S.C. § 1658, provides:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658.

STATEMENT OF FACTS

1. Congress enacted the TCPA to eliminate unsolicited facsimile advertising.

In 1991, to address a growing number of consumer complaints about the use of automated telephone equipment to make unsolicited telephone calls and to send unsolicited facsimiles advertising goods and services, Congress enacted the TCPA by amending the Communications Act of 1934. Pub. L. No. 102-243, 105 Stat. 2394 (codified as amended at 47 U.S.C. § 227). The TCPA prohibits individuals and businesses from using a facsimile machine to send unsolicited facsimile advertisements to another facsimile machine without first obtaining the recipient's consent. 47 U.S.C. § 227(b)(1)(C). It also creates a private cause of action for any violation and provides a fixed damage remedy. *Id.* § 227(b)(3). The TCPA's purpose is to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls . . . and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. Rep. No. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968.

Congress vested original jurisdiction over TCPA claims in state courts. *Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1156 (4th Cir. 1997). The TCPA's private cause of action may be brought in an appropriate state court *if otherwise permitted by the laws of a State or the rules of court of a State*. 47 U.S.C. § 227(b)(3). Federal and state courts have interpreted this phrase in three different, but inconsistent ways, two of which raise constitutional implications:

1. *Acknowledgement*: The TCPA acknowledges the constitutional principle that states have the right to structure their own court systems to accept claims based on federal law and that state courts are not obligated to change their procedural rules to accommodate federal claims such as the TCPA. Six states have adopted this interpretation. *See infra*, p. 9.

2. *Opt-out*: The TCPA permits states to enact legislation or a rule of court declining to enforce TCPA claims altogether, but unless such affirmative action is taken, aggrieved parties may bring TCPA claims in state courts of general jurisdiction. Six states have adopted this interpretation. *See infra*, p. 10.

3. *Opt-in*: The TCPA requires states to enact legislation or a rule of court "activating" the TCPA before aggrieved parties may assert claims for violations of the statute. Only Texas has adopted this interpretation. *See infra*, p. 10.

2. 28 U.S.C. § 1658, the federal residual limitations statute.

This case also concerns the issue of whether and how to apply the four-year residual limitations period set forth in 28 U.S.C. § 1658. Enacted on December 1, 1990, section 1658 provides a four-year limitations period for any claim arising under a federal statute enacted after 1990 that has no limitations period. 28 U.S.C. § 1658. The TCPA falls squarely under the statute, as it was enacted after section 1658 and

has no limitations period. *See* 47 U.S.C. § 227 *et seq.* The Texas Fourteenth Court of Appeals held that section 1658 does not apply to the TCPA because states are allowed to apply their own limitation periods to TCPA claims. *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 135 S.W.3d 365 (Tex. App. – Houston [14th Dist.] 2004), *rev'd*, 49 Tex. Sup. Ct. J. 336, 2006 Tex. LEXIS 97, (Tex. Feb. 3, 2006). The court held that because states have exclusive jurisdiction over private TCPA claims and have the power to accept the claims pursuant to their laws and rules of court, Congress intended that state courts borrow state limitation periods under section 1658's "except as otherwise provided by law" language. *Id.* The Texas Supreme Court declined to reach this issue because its primary holding – that there is no maintainable private cause of action in Texas courts under the TCPA – was dispositive. *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 49 Tex. Sup. Ct. J. 336, 2006 Tex. LEXIS 97, (Tex. Feb. 3, 2006).[1]

3. The history of this case.

From as early as 1992, Petitioners (collectively "Chair King")[2] received thousands of unsolicited fax ads over their machines without permission. (App. at 3a). After Chair King filed suit against GTE and Chick-Fil-A alleging violations

1. This case was recently reported at *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 184 S.W.3d 707 (Tex. 2006).

2. Although Chair King is no longer a party because the Court of Appeals dismissed its claims, (App. at 81a, 87a-88a), the Petitioners have collectively gone by this name throughout the court process and are referred to as such in the appellate court decisions complained about here. Thus, to maintain consistency, Petitioners will continue to refer to themselves as Chair King.

of the TCPA, GTE and Chick-Fil-A filed motions for summary judgment arguing that Chair King could not bring suit under the TCPA because the statute's language "if otherwise permitted by the laws or rules of court of a State" required that Texas first "opt-in" to the federal statute before a claimant could bring a TCPA claim. (App. at 4a). GTE and Chick-Fil-A also moved for summary judgment based on limitations, arguing that Texas' two-year limitations period applied to the TCPA. (App. at 4a). Chair King argued the acknowledgement theory, with the "opt-out" theory as an alternative. (App. at 9a). The trial court rendered judgment against Chair King in an order signed March 7, 2000. (App. at 89a).[3]

Chair King appealed to the Fourteenth Court of Appeals of Texas, arguing in part that it was a violation of the Supremacy Clause for the trial court not to enforce the TCPA. (App. at 56a-57a). The court of appeals reversed the trial court's judgment as to GTE, holding that the TCPA did not require states to "opt-in" to the federal legislation before enforcing the statute. (App. at 52a). Chair King also argued that 28 U.S.C. § 1658 supplied a four-year statute of limitations. (App. at. 73a-77a). The appellate court affirmed the judgment as to Chick-Fil-A based on its opinion that Texas' two-year limitations period applied to the TCPA rather than the four-year period provided for in 28 U.S.C. § 1658. (App. at 77a). The court of appeals remanded the case against GTE but rendered judgment in favor of Chick-Fil-A. (App. at 88a-89a).

Chair King filed a Petition for Review in the Texas Supreme Court seeking review of the appellate court's

3. Chair King brought suit against other parties and settled those claims before the appeal. (App. at 4a).

affirmance of Chick-Fil-A's summary judgment on the limitations issue, and GTE filed a Petition for Review seeking review of the appellate court's reversal of GTE's summary judgment on the opt-in issue. (App. at 4a-5a). Chair King argued in favor of the acknowledgement or opt-out view and argued that opt-in would be unconstitutional. (App. 9a-11a). The Texas Supreme Court granted both petitions and on February 3, 2006, reversed the court of appeals' judgment and rendered judgment that Chair King take nothing against either Defendant. (App. at 25a). In its opinion, the court held that states are required to enact their own legislation enabling the federal law before citizens may bring claims under the TCPA, and that because Texas had not done so when GTE and Chick-Fil-A violated the statute, Chair King had no cause of action against them. (*Id.*) The Court declined to address the limitations issue. (*Id.*)

REASONS FOR GRANTING THE PETITION

I. This Court should resolve the split in state and federal courts over whether TCPA claims can be brought in state court in the absence of "enabling" legislation or rules of court.

This case involves a state court determination that interprets a federal law, the TCPA, 47 U.S.C. § 227 *et seq.*, an issue within this Court's jurisdiction. 28 U.S.C. § 1257(a); *Oregon v. Guzek*, 126 S. Ct. 1226, 1229 (2006). The decision below ascribes to Congress an intention to delegate to state legislatures and rule-making bodies the authority to decide whether their courts will entertain TCPA claims, an interpretation that raises serious Supremacy Clause and

federalism concerns.[4] The Texas Supreme Court is the first and only state high court to interpret the TCPA as requiring that states "opt-in" to the statute's enforcement before claims may be brought for TCPA violations. The decisions of other state and federal courts are in conflict, and are contrary to the decision challenged here.

Review of this case will afford the Court an opportunity to resolve the conflict over this federal law that has arisen from state courts' and federal courts' inconsistent interpretations of the TCPA and also to determine to what extent states are required to enforce this federal law under the Supremacy Clause and to what extent federalism principles are disturbed by the TCPA's scheme. *See Tafflin v. Levitt*, 493 U.S. 455, 460-61 (1990). For over ten years now, state and federal courts have struggled in construing the enforceability of the TCPA in state courts. Unfortunately, this analysis has not produced a harmonious application of the TCPA; instead, the courts' various interpretations are now in direct conflict. Therefore, the issue is ripe for this Court's decision.

A. A conflict exists between the highest courts of two or more states on a question of federal law.

This Court has previously granted certiorari in cases that present a conflict in decisions of the highest courts of two or more states on a federal question. *See* SUP. CT. R. 10(b); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 780 n.10 (1981). Here, the highest courts and intermediate appellate courts of several states have split over

4. Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt-In? Can States Opt-Out?*, 33 CONN. L. REV. 407 (2001).

whether states are required by the Supremacy Clause to enforce TCPA claims or whether they can reject these claims until a law or rule of court is enacted that "enables" the federal law. As discussed *supra* at 3-4, courts have interpreted the TCPA's phrase "if otherwise permitted by the laws of a state or rules of court of a state" in three ways:

Acknowledgement (6 states and 1 federal court):

Colorado – *Consumer Crusade v. Affordable Health Care Solutions*, 121 P.3d 350 (Colo. Ct. App. 2005, no writ);

Florida – *Condon v. Office Depot, Inc.*, 855 So.2d 644 (Fla. Dist. Ct. App. 2003, no writ);

Georgia – *Hooters of Augusta, Inc. v. Nicholson*, 537 S.E.2d 468 (Ga. App. 2000, writ denied);

Maryland – *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc.*, 857 A.2d 1 (Md. 2004, no writ);

New Jersey – *Zelma v. Market U.S.A.*, 778 A.2d 591 (N.J. Super. Ct. App. Div. 2001, no writ);

New York – *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000, no writ);

Federal District Court – *Accounting Outsourcing, LLC v. Verizon Wireless Personal Commc'ns*, 329 F. Supp. 2d 789, 802 (M.D. La. 2004, no writ);

Opt-out (6 states and 1 federal court):

Alabama – *Lary v. Flasch Business Consulting*, 878 So.2d 1158 (Ala. Civ. App. 2003, no writ);

California – *Kaufman v. ACS Sys. Inc.*, 110 Cal. App. 4th 886, 2 Cal. Rptr. 3d 296 (Cal. Ct. App. 2003, pet. denied);

Massachusetts – *Mulhern v. MacLeod*, 808 N.E.2d 778 (Mass. 2004, no writ);

Missouri – *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907 (Mo. 2002, no writ);

Nevada – *Edwards v. Direct Access, L.L.C.*, 124 P.3d 1158 (Nev. 2005, no writ);

Pennsylvania – *Aronson v. Fax.com, Inc.*, 51 Pa. D. & C.4th 421 (Pa. Ct. Com. Pl. 2001, no writ);

Fourth Circuit Court of Appeals – *Int'l Science & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146 (4th Cir. 1997, no writ);

Opt-in (1 state court):

Texas – *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 49 Tex. Sup. Ct. J. 336, 2006 Tex. LEXIS 97 (Tex. Feb. 3, 2006).

Because of this split of authority among several state and federal courts on the interpretation of this federal statute, this Court should grant certiorari. *See* SUP. CT. R. 10(b); *St. Martin*, 451 U.S. at 780 n.10.

B. A conflict exists between the highest court of a state and a federal court of appeals on a question of federal law.

This Court has also previously granted certiorari in cases involving a conflict between the highest court of a state and a federal court of appeals in the interpretation of a federal law. *See* SUP. CT. R. 10(c); *Martinez v. Court of Appeal of California*, 528 U.S. 152, 155 (2000) (granting certiorari because question raised was one "on which both state and federal courts have expressed conflicting views"). In this case, such a conflict exists because the Fourth Circuit has rejected the opt-in interpretation chosen by the Texas Supreme Court:

> The clause . . . 'if, otherwise permitted by the laws or rules of court of a State' does not condition the substantive right to be free from unsolicited faxes on State approval. . . . Rather, the clause recognizes that states may refuse to exercise the jurisdiction authorized by the statute. Thus, a state could decide to prevent its courts from hearing private actions to enforce the TCPA's substantive rights.

See Int'l Science, 106 F.3d at 1156. Thus, this Court should grant certiorari to resolve this conflict between state and federal courts over the TCPA. *See* SUP. CT. R. 10(b); *Martinez*, 528 U.S. at 155.

II. The Texas Supreme Court's opinion is a violation of the Supremacy Clause of the United States Constitution.

This Court may exercise its jurisdiction to consider a case in which a state court has decided a substantial and unsettled federal question arising under the Constitution. *See Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 362 (1998). Such is the case here.

A. States are required to enforce federal law under the Supremacy Clause.

The decision below is contrary to the Supremacy Clause requirement that states must entertain federal claims. State courts of general jurisdiction are inherently empowered and required to enforce federal law. *Tafflin*, 493 U.S. at 460-61; *Testa v. Katt*, 330 U.S. 386, 389-90 (1947). State courts with proper jurisdiction may refuse to hear federal claims only in two circumstances: (1) where Congress explicitly provides exclusive jurisdiction to federal courts over claims arising under federal law, *Tafflin*, 493 U.S. at 460-61 (citing *Houston v. Moore*, 5 Wheat. 1, 25-26, 5 L.Ed. 19 (1820)); *Printz v. United States*, 521 U.S. 898, 906 n.1 (1997), or (2) the claim is prevented by a state's neutral rule of judicial administration. *Douglas v. New York, New Haven & Hartford R.R. Co.*, 279 U.S. 377, 387-89 (1929) (state statute permitting discretionary dismissal of federal claim where neither party was resident of forum state was proper); *see also Herb v. Pitcairn*, 324 U.S. 117 (1945). Neither exception is present here.

Furthermore, under the Supremacy Clause, a state cannot refuse to hear a claim arising under federal law unless that

law exceeds its just and constitutional authority. *Printz*, 521 U.S. at 911-12 (citing The Federalist No. 27, at 177 (A. Hamilton)). This Court has consistently held that if Congress intends to permit state action – such as a state's refusal to hear federal claims – that would be unconstitutional absent congressional consent, it must make its intent "unmistakably clear." *See, e.g. S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91-92 (1984); *see also Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 466 (1989) ("[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils."). The TCPA evinces no such clear intent, nor is it certain that congressional consent to a state's refusal to entertain federal claims is a sufficient cure to the constitutional problem.

B. There is no "unmistakably clear" language in the statute showing that Congress intended to allow states to refuse TCPA claims.

In the case of the TCPA, it is not unmistakably clear that Congress' language "if otherwise permitted by the laws or rules of court of a State" was intended to give states the choice not to enforce federal law. Consequently, a state's action in refusing enforcement of the TCPA is unconstitutional. *Schulman v. Chase Manhattan Bank*, 710 N.Y.S.2d 368 (N.Y. App. Div. 2000) (citing *Mondou v. New York, New Haven, & New Hartford R.R. Co.*, 23 U.S. 1, 57 (1912)). The Texas Supreme Court's decision is therefore contrary to the Supremacy Clause because it makes the TCPA unenforceable and does away with the presumption that federal law is enforceable in state court. *Tafflin*, 493 U.S. at 460-61. Thus, this Court should exercise its jurisdiction and grant the petition. *See* 28 U.S.C. § 1257(a).

Congress gave state courts exclusive jurisdiction over private TCPA claims, which strengthens the presumption that state courts have jurisdiction to enforce this federal law. *Fed. Energy Regulatory Comm'n v. Miss.*, 456 U.S. 742, 760-761 (1982) (noting that sovereignty principles set forth in *Testa* were controlling in analyzing federal statutes requiring state regulatory agencies to consider specific federal proposals regarding the nation's energy resources). Obviously, if there is no federal question jurisdiction and no state is obliged to hear such claims, the only way TCPA claims could be heard would be as claims asserting federal diversity jurisdiction. Surely Congress did not intend to create such a perverse and byzantine enforcement scheme in which only plaintiffs suing diverse defendants would be able to maintain a claim.

C. The decision below renders the TCPA's regulatory floor meaningless.

Finally, section 227(e) of the TCPA provides that states may impose more restrictive requirements than those contained in the TCPA. 47 U.S.C. § 227(e). This provision implies that less restrictive state requirements are preempted by the TCPA. *Id.* If the TCPA were inactive until states passed redundant "enabling" legislation, as the court below held, then the TCPA would not preempt the least restrictive of all requirements – that is, no restriction at all – rendering § 227(e) meaningless. *Id.* Thus, the conclusion below violates established rules of statutory construction. *See Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 516 (3rd Cir. 1998).

III. This case involves a right asserted under a federal statute.

Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. § 1257(a). This case involves Chair King's asserted rights under the TCPA, a federal statute, and the highest court of Texas has passed judgment on the statute. Thus, this Court may properly exercise its jurisdiction over that judgment. *See Howell v. Mississippi*, 543 U.S. 440, 443 (2005).

The decision below assumes that Congress thought states would not want to permit TCPA actions (even though junk faxes were considered a "national plague") and that Congress drafted the statute so that states would be required to take the redundant step of enacting specific laws or rules of court to "enable" the TCPA. (App. at 25a). This interpretation is contrary to the statute's intended and most important purpose – to swiftly wipe out unsolicited automated facsimile and telephone telemarketing. *Chair King*, 135 S.W.3d at 377-78. There is no sound reason for concluding that Congress would pass legislation intending it to be unenforceable and ineffective. One would at least expect the TCPA's legislative history to express such an unusual intention. It does not. *Id.* at 378-79. Instead, the legislative history shows that Congress intended the bill to immediately create a private right of action so that citizens and businesses in Texas and in other states could stop unsolicited telemarketing and avoid being forced to pay for a portion of the advertisement. *Id.* at 380-81. The decision below defeats that intent.

IV. The decision below creates uncertainty about the scope of application of 28 U.S.C. § 1658 to causes of action arising under federal law.

The Texas Court of Appeals held that 28 U.S.C. § 1658, the general federal statute of limitations, does not apply to the TCPA, even though the TCPA is a federal law, was enacted after § 1658, and has no limitations period. *Chair King*, 135 S.W.3d at 393. The Texas Supreme Court granted review of whether § 1658 applies to the TCPA, but ultimately declined to decide the issue because it held that Texas was required to opt-in to the TCPA (but had not) when the violations against Chair King occurred. *Chair King*, 2006 Tex. LEXIS 97, at *33.

A. Congress enacted 28 U.S.C. § 1658 because the practice of borrowing limitations periods from state law for federal actions became unworkable.

The TCPA, like many other federal statutes, contains no statute of limitations. *See* 47 U.S.C. § 227 *et seq.* This Court has noted that Congress oftentimes fails to provide a statute of limitations in federal legislation. *See Board of Regents v. Tomanio*, 446 U.S. 478, 483 (1980); *see also Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369, 371 (2004). Left without guidance as to the appropriate limitations period for these federal actions (a decision historically made by the legislature), federal and state courts traditionally "borrowed" a limitations period from the most analogous state law claim. *Id.* at 377-78.

Over time, federal courts found this practice to be burdensome and impractical because it created difficulty determining which forum state's limitations period was most

appropriate for the federal claim, forced courts to address continuous conflict of law issues, resulted in inconsistent expectancies for limitations in federal actions, and created confusing and complicated commencement and tolling issues. *Id.* at 378-79.[5] As a result, courts and commentators called upon Congress to enact a single limitations period for all federal causes of action. *Id.*; H.R. REP. NO. 101-734, at 24 (1990).

Congress responded by enacting 28 U.S.C. § 1658 to provide a residual statute of limitations for all federal actions enacted after December 1, 1990, that have no limitations period:

> Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658; *see Jones*, 541 U.S. at 379-80. The House Report on the bill states that "with respect to many statutes that have no explicit limitations provision, the applicable limitations period found by courts varies dramatically from state to state" and that § 1658 "addresses this problem by creating a four-year fall-back statute of limitations, applicable to legislation enacted after [1990], which creates a cause of action but is silent as to the applicable limitations period." *See* H.R. REP. NO. 101-734, at 24 (1990). The Senate reached the same conclusions as the House. *See* 136 CONG. REC. S17,570 (daily ed. Oct. 27, 1990).

5. The Seventh Circuit described this method as "at best uncertain and at worst arbitrary." *See McCartney C. v. Herrin Cmty. Unit Sch. Dist., No. 4*, 21 F.3d 173, 174 (7th Cir. 1994).

B. The decision below is inconsistent with this Court's holding in *Jones*.

In *Jones*, this Court held that § 1658 applied to a petitioner's hostile work environment, wrongful termination, and failure-to-transfer claims, because they were made possible by the 1991 amendments to § 1981. 541 U.S. at 382. As in *Jones*, on its face the TCPA meets all of § 1658's elements – it is federal legislation enacted after December 1, 1990; it creates a cause of action under federal law; and it has no limitations period. 47 U.S.C. § 227; *see Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1189 (3d Cir. 2002) ("Judicial inquiry into the applicability of [§ 1658] begins and ends with what [§ 1658] does say and with what [§ 1658] does not.") (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

Even so, the Texas intermediate court of appeals held that § 1658's "[e]xcept as otherwise provided by law" language exempts the TCPA from the uniform four-year period. *Chair King*, 135 S.W.3d at 390-91. In its opinion, the court of appeals says "Congress could have enacted a TCPA private damage claim with a four-year federal limitations period." *Chair King*, 135 S.W.3d at 391. Congress did exactly that by enacting the TCPA without altering the general four-year limitations period of § 1658. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-98 (1979); *see also Argonaut Ins. Co. v. Baker*, 87 S.W.3d 526, 531 (Tex. 2002) (noting that a statute is presumed to have been enacted by the legislature with complete knowledge of the existing law and with reference to it). Congress created § 1658 so that neither it nor the courts would have to revisit limitations every time a new federal cause of action was created. *See Jones*, 541 U.S. at 378-79. Not applying § 1658 to TCPA

actions conflicts with this Court's broad reading of § 1658 in *Jones*. *See id.*; *see also* SUP. CT. R. 10(c). Accordingly, this Court should grant certiorari. *See Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362 (1984); *Hudson v. Louisiana*, 450 U.S. 40, 42 (1981).

C. The decision below revives the practice of borrowing state law limitations for federal actions in federal court.

Congress did not remove diversity jurisdiction from federal courts when it passed the TCPA; it removed only federal question jurisdiction. *See* 28 U.S.C. § 1332; *Gottlieb v. Carnival Corp.*, 436 F.3d 335, 339 (2d Cir. 2006); *Accounting Outsourcing, L.L.C.*, 329 F. Supp. 2d at 818 (holding plaintiffs could maintain class action TCPA claims under diversity jurisdiction assuming class action test satisfied).[6] Thus, although private TCPA claims cannot be maintained in federal court under *federal question jurisdiction*, such claims can be filed or removed to federal court under *diversity jurisdiction*. *Id.* In a diversity case, the federal court would apply the limitations period from the same source as the substantive law – here federal law. *See Chair King*, 135 S.W.3d at 390 (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 108-11 (1945)). This would require

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6. *See also Kinder v. Citibank*, No: 99-CV-2500 W (JAH), 2000 U.S. Dist. LEXIS 13853, *5-8 (S.D. Cal. Sept. 14, 2000) (holding diversity of citizenship is independent basis for federal jurisdiction and nothing in TCPA precludes federal courts from hearing private TCPA claims where this independent basis for federal jurisdiction exists); *Kopff v. World Research Group, LLC*, 298 F. Supp. 2d 50, 55-56 (D.D.C. 2003) (same); *Gold Seal Termite & Pest Control Co. v. DirecTV, Inc.*, No. 1:03-cv-00367-LJM-WTL, 2003 U.S. Dist. LEXIS 11205, *16 (S.D. Ind. June 10, 2003).

the application of § 1658 to the federal action. *Chair King*, 135 S.W.3d at 390. The same is true for any other federal action removed to federal court where concurrent jurisdiction applied. *See Mulhern v. MacLeod*, 808 N.E.2d 778 (Mass. 2004).

However, the court of appeals' holding means that in TCPA diversity actions, state law will supply different limitations periods for federal actions in federal courts, bringing us back full circle to the problem Congress sought to eliminate by passing a universal limitations period for actions that it created after 1990. *See Jones*, 541 U.S. at 378-79. Some states would apply a two-year rule, others four or five. This "limitations hodge-podge" is not what Congress intended. *See id.*

Moreover, because the FCC and State Attorneys General can file TCPA claims in federal court, § 1658 will likely apply to these actions. 47 U.S.C. § 227(c)(5), § 227(f). Under the appellate court's decision, though, the private claims will be subject to state law tort limitations. *Chair King*, 135 S.W.3d at 391. There is no reason for this internal inconsistency, with one limitations period for governmental claims and another for private causes of action. They are all federal claims and should all have the same limitations period – the one set up by § 1658. *See* 47 U.S.C. § 227(b)(3), (c)(5), (f).

Finally, the resort to a shorter limitations period – here, two years – is flatly inconsistent with the TCPA's provision expressly preempting less restrictive state provisions. A shorter period for bringing claims is more restrictive on the claimants and therefore less restrictive on alleged violators of the statute.

D. The decision below means that at least four states have inconsistently applied 28 U.S.C. § 1658 to the TCPA.

The decision below creates a split on the issue of whether 28 U.S.C. § 1658 applies to the TCPA. *Compare Chair King*, 135 S.W.3d at 391 (holding that 28 U.S.C. § 1658 does not apply to the TCPA) and *David L. Smith & Assoc., L.L.P. v. Advanced Placement Team*, 169 S.W.3d 816, 822 (Tex. App. – Dallas 2005, pet. denied) (same) *with Zelma v. Konikow*, 879 A.2d 1185, 1190 (N.J. Super. Ct. App. Div. 2005) (holding that 28 U.S.C. § 1658 applies to the TCPA) *and Edwards v. Emperor's Garden Rest.*, 130 P.3d 1280 (Nev. 2006) (same).

CONCLUSION

The Texas Supreme Court's decision completes a three-way split among the highest courts of several states in the interpretation of the phrase "if otherwise permitted by the laws or rules of court of a State" in the TCPA. Thus, this issue has percolated up through the state and federal courts and is now ripe for review. Likewise, the decision of the intermediate Texas Court of Appeals regarding limitations means that at least four states have now split over what law – federal or state – should be the source of the limitations period for claims brought under the TCPA. This case brings these issues squarely before this Court, and warrants an exercise of this Court's jurisdiction to review and resolve these conflicts.

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF TEXAS ARUGUED APRIL 14, 2005 OPINION DELIVERED FEBRUARY 3, 2006

SUPREME COURT OF TEXAS

NO. 04-0570

April 14, 2005, Argued
February 3, 2006, Opinion Delivered

THE CHAIR KING, INC., CHAIR KING, S.A., INC., JEROME KOSOY, M.D., M.E. FORD AND ASSOCIATES, BEAUTIQUE, INC., DISCOVERY SERVICES OF TEXAS, INC., VANTAGE SHOE WAREHOUSE, INC., COUNSELOR SYSTEMS, INC., POPE AND BOOTH, P.C., JEFFREY K. MUSKER, D.C., AND POPE ESCROW COMPANY,

PETITIONERS,

v.

GTE MOBILNET OF HOUSTON, INC., AND CHICK-FIL-A, INC.,

RESPONDENTS.

NOTICE: PUBLICATION STATUS PENDING. CONSULT STATE RULES REGARDING PRECEDENTIAL VALUE.

PRIOR HISTORY: ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS. *Chair King Inc. v. GTE Mobilnet of*

Appendix A

Houston, Inc., 135 S. W.3d 365, 2004 Tex. App. LEXIS 4152 (Tex. App. Houston 14th Dist, 2004)

JUDGES: JUSTICE O'NEILL delivered the opinion of the Court. JUSTICE WAINWRIGHT did not participate in the decision.

OPINION BY: Harriet O'Neill

OPINION

JUSTICE O'NEILL delivered the opinion of the Court.

JUSTICE WAINWRIGHT did not participate in the decision.

The suit underlying this appeal complains of unsolicited faxes sent in violation of the federal Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"), which grants those who receive illegal faxes a private cause of action in state court "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 2271(b)(3). Texas did not expressly permit a private right of action for unsolicited faxes until September 1, 1999, when the Legislature amended the Business and Commerce Code to allow parties to bring suit in state court for TCPA violations. Act of May 26, 1999, 76th Leg., R.S., ch. 635, § 1, 1999 Tex. Gen. Laws 3203 (current version at TEX BUS. & COM CODE § 35.47(f)). We must decide whether the faxes at issue in this case, which were sent before September 1, 1999, are actionable in Texas state courts under the TCPA. We conclude that they are not, and reverse and render judgment against the recipients.

Appendix A

I. Background

Beginning in 1992, The Chair King, Inc., and others[1] (collectively "plaintiffs" or "recipients") complain that they began to receive illegal faxes from various companies advertising their products. They originally filed suit in federal court, but the court dismissed the case for lack of subject-matter jurisdiction.[2] *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997). The plaintiffs then filed this suit in state court against a number of defendants[3]

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1. Chair King, S.A., Inc., Jerome Kosoy, M.D., M.E. Ford and Associates, Beautique, Inc., Discovery Services of Texas, Inc., Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope 2006 and Booth, P.C., Jeffrey K. Musker, D.C., and Pope Escrow Company.

2. Like nearly all federal courts that have considered the jurisdictional issue, the Fifth Circuit determined that state court jurisdiction over private TCPA actions is exclusive of, not concurrent with, federal court jurisdiction. *Chair King v. Houston Cellular Corp.*, 131 F.3d at 513; *see Murphey v. Lanier*, 204 F.3d 911, 913-15 (9th Cir. 2000); *Int'l Sci. & Tech. Inst., Inc. v. Inacom Commc'ns, Inc.*, 106 F.3d 1146, 1152 (4th Cir. 1997); *ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 520 (3d Cir. 1998); *Foxhall Realty Law Offices, Inc. v. Telecomms. Premium Serv's., Ltd.*, 156 F.3d 432, 438 (2d Cir. 1998); *Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998), *modified by* 140 F.3d 898 (11th Cir. 1998); *contra Kenro, Inc. v. Fax Daily, Inc.*, 904 F. Supp. 912, 915 (S.D. Ind. 1995), *Kenro, Inc. v. Fax Daily, Inc.*, 962 F. Supp. 1162, 1164 (S.D. Ind. 1997). The parties do not dispute that determination, and we will presume it here.

3. Chevrolet Country, Inc., Watson Investment Group, Inc., Amaturo Group, Ltd., Budget Rent-a-Car Systems, Inc., and Hillcroft Enterprises, Inc. GTE Mobilnet and Chick-Fil-A, among dozens of (Cont'd)

alleging a private damage claim under the TCPA, negligence, negligence per se, invasion of privacy, trespass to chattels, gross negligence, and conspiracy among the senders. The trial court granted the defendants' joint and individual summary-judgment motions and denied the plaintiffs' motion for partial summary judgment. The plaintiffs settled with various defendants during the course of the proceedings, leaving only GTE Mobilnet of Houston, Inc. ("GTE Mobilnet") and Chick-Fil-A, Inc. ("Chick-Fil-A") as defendants before the court of appeals.

The court of appeals affirmed the trial court's judgment in part, and reversed and remanded in part. 135 S.W.3d 365. Specifically, the court affirmed the trial court's summary judgment on all of the common-law claims, on all claims against Chick-Fil-A after applying Texas' two-year statute of limitations, and on certain plaintiffs' TCPA claims against GTE Mobilnet that the court considered barred by limitations. *Id.* at 396-97. The court reversed the trial court's judgment as to the remaining plaintiffs' TCPA claims against GTE Mobilnet,[4] which were remanded for further proceedings. *Id.*

Both sides petitioned this Court for review, the plaintiffs challenging the court of appeals' determination of the limitations issue and the defendants contending, *inter alia*,

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(Cont'd)

others, were subsequently added as defendants in the plaintiffs' first amended original petition.

4. The remaining claims are those of Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C.

that there was no TCPA private right of action cognizable in Texas courts until the Legislature enacted enabling legislation in 1999. Alternatively, defendants claim they cannot be liable for faxes transmitted by independent advertising companies acting at the behest of independent retailers. We granted the parties' petitions for review to consider the TCPA's application and related issues.

II. The Telephone Consumer Protection Act

A. History

Congress enacted the Telephone Consumer Protection Act in 1991 by amending the Communications Act of 1934. Pub. L. No. 102-243, 105 Stat. 2394, (codified as amended at 47 U.S.C. § 227). The TCPA's purposes were to "protect the privacy interests of residential telephone subscribers by placing restrictions on unsolicited, automated telephone calls . . . and to facilitate interstate commerce by restricting certain uses of facsimile (fax) machines and automatic dialers." S. REP. NO. 102-178, at 1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1968, 1968. The legislation was intended to address a growing number of consumer complaints related to the use of automated telephone equipment to make unsolicited telephone calls and faxes. That growth was spurred by a dramatic decrease in the cost of long-distance service, which in turn reduced the expenses associated with telemarketing. *Id.* at 2, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1969-70.

Before the TCPA's enactment, many states had promulgated regulations aimed at limiting unsolicited

intrastate telemarketing, but constitutional constraints prevented them from reaching interstate communications. *Id.* at 3, *reprinted in* 1991 U.S.C.C.A.N. 1968, 1970 (noting "States do not have jurisdiction over interstate calls. Many States have expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls."). By the time the TCPA became law, over forty states had legislatively limited the use of automatic-dialer recorded-message players or otherwise restricted telemarketing.[5] *Id., reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. But given that state regulation reached only intrastate communications, consumer complaints to the Federal Communications Commission (FCC) soared. *Id., reprinted in* 1991 U.S.C.C.A.N. 1968, 1970. The TCPA quickly followed.

B. Statutory Framework

The TCPA presents what has been described as "an unusual constellation of statutory features." *Chair King*, 131 F.3d at 512. On one hand, the Act creates a federal private right of action, but on the other it confers exclusive jurisdiction on state courts to entertain it. *Id.* The TCPA does contain an exclusive federal enforcement component, authorizing state attorneys general to bring civil actions in federal court on behalf of their state's residents to obtain injunctive relief against unauthorized telephone calls and

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5. Texas did not recognize a private cause of action for unsolicited faxes, but had enacted a criminal statute making it a Class C misdemeanor to advertise by such means. *See* Act of May 23, 1989, 71st Leg., R.S., ch. 783, § 1, 1989 Tex. Gen. Laws 3469, 3469 (current version at TEX BUS. & COM. CODE § 35.47(e)).

facsimiles and to recover monetary damages. 47 U.S.C. § 227 (f)(1)-(2). For such actions the TCPA authorizes the FCC to intervene as of right, to be heard in all such matters, and to file petitions for appeal. 47 U.S.C. § 227(3). But for purposes of private enforcement and redress, state-court jurisdiction is exclusive.

Under the TCPA, it is illegal to "use any telephone facsimile machine, computer or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1),(c). Section 227(b)(3) creates a private right of action for recipients of unsolicited faxes to obtain monetary and injunctive relief, as follows:

> **Private Right of Action**. A person or entity may, *if otherwise permitted by the laws or rules of court of a State*, bring in an appropriate court of that State –
>
> > (A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,
> >
> > (B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or
> >
> > (C) both such actions.

Id. § 227(b)(3) (emphasis added). It is the import of the statutory proviso—"if otherwise permitted by the laws or rules of court of a State"—that the parties dispute and that courts have struggled to interpret.

The defendants claim the right of action that the TCPA affords is not self-implementing; that is, the private cause of action the Act creates is not immediately enforceable in Texas courts without state enabling legislation. For the plaintiffs to bring such a claim, defendants contend, Texas laws or rules of court must "otherwise permit" it, and Texas did not until September 1, 1999, when the Legislature amended the Texas Business and Commerce Code to permit private TCPA claims.[6] Act of May 26, 1999, 76th Leg., R.S., ch. 635, § 1, 1999 Tex. Gen. Laws 3203, 3203 (codified as amended at TEX. BUS. & COM. CODE § 35.47(f)). Defendants' argument mirrors what has sometimes been referred to as the "opt-in" approach to the TCPA, in effect requiring some type of affirmative state buy-in before the federally-created private right of action is cognizable in state court.

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6. Section 35.47(f) states in pertinent part:

> A person who receives a communication that violates 47 U.S.C. Section 227, a regulation adopted under that provision, or this section may bring an action against the person who originates the communication in a court of this state for an injunction, damages in the amount provided by this subsection, or both.

TEX BUS. & COM CODE 35.47(f).

The plaintiffs take a contrary view. Because the TCPA is federal law, they claim, state courts of general jurisdiction are inherently empowered, and indeed required, to enforce it. *See Tafflin v. Levitt*, 493 US. 455, 459-61, 110 S.Ct. 792, 107 L.Ed 2d 887 (1990). According to plaintiffs, the TCPA created an immediately actionable private right of action in state court and there was no need for state enabling legislation. To support their position, plaintiffs posit two interpretations of the TCPA commonly known as "acknowledgment" and "opt-out."

For reasons that we will explain, we believe the TCPA's plain language, purpose, and historical context favor the "opt-in" interpretation. We begin by examining all three interpretive approaches and the reasoning behind them.

C. Interpreting the Statutory Proviso

1. The "Acknowledgment" Approach

The "acknowledgment" position that some courts have adopted interprets the *Supremacy Clause of the United States Constitution* to require states to provide a forum for private TCPA damage claims with no ability to decline. *See R.A. Ponte Architects, Ltd v. Investors' Alert, Inc.*, 382 Md. 689, 857 A.2d 1 (Md. 2004); *Consutner Crusade, Inc. v. Affordable Health Care Solutions, Inc.*, 121 P.3d 350, 2005 Colo. App. LEXIS 1354 (Colo. Ct. App. Aug. 25, 2005); U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States. . .shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ."). The focal point of the "acknowledgment" approach is the general rule that a state may not decline to enforce a federal cause of action:

Appendix A

> The Constitution and laws passed pursuant to it are as much laws in the State as laws passed by the state legislature. The *Supremacy Clause* makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure.

Howlett v. Rose, 496 U.S. 356, 367, 110 S. Ct. 2430, 110 L. Ed 2d 332 (1990). According to this view, no state enabling legislation is necessary for parties to assert private TCPA causes of action, and states may not decline to entertain them. The presumption of state-court jurisdiction over federal causes of action can be rebutted only "by an explicit statutory directive, by unmistakable implication from legislative history, or by a clear incompatibility between state-court jurisdiction and federal interests," *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478, 101 S. Ct. 2870, 69 L. Ed 2d 784 (1981), and courts espousing the acknowledgment view have found nothing in the TCPA's language or legislative history to rebut the presumption. *See, e.g., Consumer Crusade*, 121 P.3d 350, 2005 Colo. App. LEXIS 1354, at *9.

It is, of course, generally true that states may not decline to recognize or enforce federal law. *Howlett*, 496 US. at 371. But the federal law that states are required to enforce must be applied according to its terms. Had the TCPA simply provided that "[a] person or entity may . . . bring . . . an action based on a [TCPA] violation," the states' constitutional obligation under the *Supremacy Clause* to entertain such claims would be irrefutable. But Congress chose to qualify the private TCPA right of action it created by including the proviso "if otherwise permitted by the laws or rules of court

of a State." 47 U.S.C. § 227(b)(3). Failure to give effect to the statutory proviso would itself run the risk of violating the *Supremacy Clause* by refusing to apply the federal right as written.

Under the "acknowledgment" interpretation, the TCPA's "if otherwise permitted" language merely acknowledges states' rights to structure their court systems and apply neutral state-court procedures to federal causes of action. *See, e.g., Consumer Crusade*, 121 P.3d 350, 2005 Colo. App. LEXIS 1354, at *10 (stating "no state can refuse to entertain a private TCPA action, but a state is not compelled to adopt special procedural rules for such actions"). Courts adopting this interpretation have relied heavily on a speech by the TCPA's author, Senator Ernest Hollings of South Carolina, when he introduced the substitute bill containing the private right of action eventually codified at 47 U.S.C. § 227(b)(3):

> The substitute bill contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the bill. The bill does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court. The consumer outrage at receiving these calls is clear.

> Unless Congress makes it easier for consumers to obtain damages from those who violate this bill, these abuses will undoubtedly continue.
>
> Small claims court or a similar court would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the bill if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this bill.

137 CONG. REC. 30821-22 (1991) (statement of Sen. Hollings). Senator Hollings's speech on the day the substitute bill was introduced is the only available legislative history concerning the private-right-of-action provision.

We do not find the argument that Senator Hollings's speech compels an "acknowledgment" interpretation persuasive. While the statement may have accurately reflected Senator Hollings's understanding of the private right of action, there can be no certainty that it reflected the view of the entire Congress. *See Gen. Chem. Corp. v. De La Lastra*, 852 S. W.2d 916, 923, 36 Tex. Sup. Ct. J. 574 (Tex. 1993) ("The intent of an individual legislator, even a statute's principal author, is not legislative history controlling the construction to be given a statute."). And even if we were to presume that Senator Hollings's speech accurately captured congressional intent, it can just as fairly be read to support

an "opt-in" approach. By stating his expectation that "the States will act reasonably in permitting their citizens to go to court to enforce this bill," Senator Hollings implies that states must act in an affirmative manner before the TCPA private damage claim is cognizable in state court. In sum, we believe that Senator Hollings's remarks are of limited interpretive value.

The "acknowledgment" approach to interpreting the TCPA's "if otherwise permitted" proviso presents a number of problems. For one, it renders certain language in the TCPA "doubly redundant." *Chair King*, 135 S. W.3d at 381. State district courts of general jurisdiction are presumed to have adjudicative power over federal statutory private damage claims unless Congress specifically decides otherwise, so there would be no reason for Congress to import that general principle into the statutory proviso when it does not do so in other federal statutes. *See id.* Nevertheless, Congress did choose to acknowledge this general principle elsewhere in the TCPA by stating that suit may be brought "in an appropriate court of that State." 47 U.S.C. § 227(b)(3). Interpreting the "if otherwise permitted" provision to have the same meaning "would be redundant and risk rendering the words meaningless." *Chair King*, 135 S. W.3d at 382.

The strongest argument supporting the "acknowledgment" approach emphasizes the statutory proviso's reference to court rules: "if otherwise permitted by the laws *or rules of court* of a State. . . ." 47 U.S.C. § 227(b)(3) (emphasis added). "Rules of court" generally refer to the procedures courts implement to conduct official business. See, e.g., BLACK'S LAW DICTIONARY 369 (7th

ed. 1999) (defining "court rules" as "regulations having the force of law governing practice and procedure in the various courts"). Plaintiffs assert that by referencing "rules of court," which generally do not confer subject-matter jurisdiction over causes of action, Congress chose to acknowledge states' rights to independently administer their own courts and, by negative implication, signaled no intent to require affirmative legislative action at the state level before a party could exercise the private right of action. Any other interpretation, plaintiffs claim, would render the "rules of court" language mere surplusage. *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 580, 44 Tex. Sup. Ct. J. 158 (Tex. 2000). However, applying an "acknowledgment" interpretation to the statutory proviso is no less problematic. As we have said, the same rule against surplusage is equally applicable to the "acknowledgment" interpretation. *See Chair King*, 135 S. W.3d at 381 (stating "it would be redundant and risk rendering the words meaningless to interpret the 'if otherwise permitted' clause to have the same meaning [as the clause allowing suit 'in an appropriate court of that State']"). Moreover, if the statutory reference to "rules of court" was intended to imply no state option over allowing the federally created claim, the "if otherwise permitted *by the laws . . . of a State*" language would be rendered surplusage. 47 U.S.C. § 227(b)(3,) (emphasis added); *see Spradlin*, 34 5. W.3d at 580.

In sum, we see no clear indication in either the statutory language or the legislative history that would indicate Congress intended to unconditionally mandate a private TCPA damage claim in state court that the states could not choose to decline. Like the court of appeals, we reject the

"acknowledgment" interpretation of the TCPA that some courts have followed.

Having determined that the statutory proviso was intended to give the TCPA some conditional effect, we must decide whether Congress intended for the Act to apply unless a state opted out, or only if a state opted in.

2. The "Opt-out" Approach

The "opt-out" interpretation reads the TCPA to immediately authorize private rights of action in state court without the necessity of affirmative state action, but allows states to legislatively decline to entertain them. To date, this appears to be the majority view of the relatively few courts that have had occasion to decide the issue. *See Mulhern v. MacLeod*, 441 Mass. 754, 808 N.E.2d 778 (Mass. 2004); *Lary v. Flasch Bus. Consulting*, 878 So. 2d 1158 (Ala. Civ. App. 2003,); *Condon v. Office Depot, Inc.*, 855 So. 2d 644 (Fla. Dist. Ct. App. 2003); *Kaufman v. ACS Sys., Inc.*, 110 Cal. App. 4th 886, 2 Cal. Rptr. 3d 296 (Cal Ct. App. 2003); *Reynolds v. Diamond Foods & Poultry Inc.*, 79 S.W.3d 907 (Mo. 2002); *Zelma v. Market U.S.A.*, 343 N.J. Super. 356, 778 A.2d 591 (N.J. Super. Ct. App. Div. 2001); *Aronson v. Fax.com Inc.*, 51 Pa. D. & C.4th 421 (Ct. Com. Pl. 2001); *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga. App. 363, 537 S.E.2d 468 (Ga. Ct. App. 2000); *Schulman v. Chase Manhattan Bank*, 268 A.D.2d 174, 710. N.Y.S.2d 368 (N.Y App. Div. 2000). Of the courts that follow the "opt-out" position, none has yet determined that a state has actually opted out of providing a forum for private TCPA claims.

Until this case, only one court of appeals in Texas has had occasion to interpret section 227(b)(3)'s "if otherwise permitted" proviso,[7] and it determined that the statute's plain language compelled an "opt-in" interpretation; that is, a state must affirmatively act before the federally-created claim is cognizable in its courts. *Autoflex Leasing, Inc. v. Mfrs. Auto Leasing*, 16 S.W.3d 815, 817 (Tex. App.—Fort Worth 2000, *pet. denied*). The court held that the "plain and ordinary" meaning of the statutory proviso indicates "Congress intended the states to pass legislation or promulgate court rules consenting to state court actions based on the TCPA, before such suits under the TCPA may be brought in state courts." *Id.* Because Texas did not authorize a private right of action in state court under the TCPA until September 1, 1999, and the faxes at issue in *Autoflex* were sent before the state legislation became effective, the court affirmed the trial court's judgment dismissing the plaintiff's claim. *Id.* at 817-18.

In this case, the court of appeals rejected the *Autoflex* interpretation in favor of the "opt-out" approach for several reasons, some of which have similarly led other courts along the same path. *Chair King*, 135 S.W.3d at 379. Those reasons,

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7. A recent decision from the Court of Appeals for the Fifth Court of Appeals District reviewed the TCPA's "if otherwise permitted" proviso, but only in the context of determining the applicable limitations period. *See Smith & Assocs., LLP v. Advanced Placement Team, Inc.*, 169 S.W.3d 816 (Tex. App—Dallas 2005, pet. filed,) (dismissing the plaintiff's TCPA claims in holding that the Texas two-year limitations period applicable to state-law claims under section 35.47 of the Texas Business and Commerce Code also applied to the TCPA claims).

generally, are that the "opt-out" interpretation gives greater deference to the *Supremacy Clause*, *id.* at 382, and the "opt-in" position is "inefficient and ineffective" considering Congress's intention to help states regulate unsolicited interstate faxes. *Id.* at 380. We examine each of these considerations in turn.

The court of appeals rejected the "acknowledgment" notion that the *Supremacy Clause* mandates unconditional state enforcement of private TCPA damage claims because of internal inconsistencies in the statutory language such an interpretation would create. *Id.* at 381-82. If Congress wished to unconditionally mandate TCPA enforcement in state courts, the court of appeals explained, it could easily do so by amending the TCPA and preempting state statutes to the contrary. *Id.* at 382. But at the same time, by construing the TCPA private right of action as mandatory unless a state legislatively declines enforcement, it appears the court of appeals attempted to give a nod to *Supremacy Clause* concerns. *Id.* Of course, Congress's ability to clarify the extent of its mandate by amending the statute is the same whether the proviso is construed as "acknowledgment," "opt-out," or "opt-in." More importantly, as we have said, the TCPA defines the federal cause of action with a prominent proviso; giving effect to the proviso that Congress created cannot run afoul of the *Supremacy Clause*. Having concluded that Congress intended the statutory proviso to have some conditional effect, be it "opt-out" or "opt-in," we fail to see how *Supremacy Clause* concerns are implicated at all.

The court of appeals also reasoned that the "opt-in" approach does not comport with Congress's purpose to help states regulate and penalize illegal fax advertisements by overcoming their inability to regulate interstate faxes. *Id.* at 380. The court posited that there would be no reason for Congress to create a statutory remedy that would allow states to regulate illegal interstate faxes but at the same time prohibit them from doing so until the state enacted enabling legislation; such a result would be, the court concluded, "inefficient and ineffective." *Id.* (citing *Aronson*, 51 Pa. D. & C.4th at 429).

This interpretation, though, ignores the unique nature of the federal right of action the TCPA created. Rather than make federal court jurisdiction over private TCPA claims concurrent with that of state courts, Congress chose to make the private remedy available exclusively through state-court proceedings. Such a conscious decision was undoubtedly due, at least in part, to the estimated eighteen million telemarketing calls made daily. Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(3), 105 Stat. 2394 (1991); *see Int'l Sci. & Tech. Ins., Inc. v. Inacom, Commc'ns, Inc.*, 106 F.3d 1146, 1157 (4th Cir. 1997). Understandably, Congress opted to close federal courts to the millions of potential private TCPA claims since the overwhelming locus of regulation was centered in the states. *Int'l Sci.*, 106 F.3d at 1154. It is not unreasonable to presume, then, that Congress recognized the potential burden on state courts these claims could present. "Congress acted rationally in both closing federal courts and allowing states to close theirs to the millions of private actions that could be filed if only a small portion of each year's 6.57 billion telemarketing

transmissions were illegal under the TCPA." *Id.* Considering the potential burden on state court resources a flood of private TCPA claims might present, it is logical that Congress would choose to allow the states themselves to have some voice in the matter. *Id.* (holding "that private actions under the TCPA may be permitted in some state courts and prohibited in others, *as determined by the states*, does not render the TCPA violative of the equal protection component of the *Fifth Amendment's Due Process Clause*") (emphasis added). "States thus retain the ultimate decision of whether TCPA actions will be cognizable in their courts." *Id.* at 1158.

We think it significant that the reason Congress created the TCPA private right of action at all was "out of solicitude for states which were thwarted in their attempts to stop unwanted telemarketing." *Id.* at 1154. Congress noted in the TCPA: "Over half the States have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices." Telephone Consumer Protection Act of 1991, PUB. L. NO. 102-243, § 2(7), 105 Stat. 2394 (1991). The principal motivation behind the TCPA strongly suggests that its remedies were meant to enhance the states' existing attempts to regulate unsolicited calls and faxes. As the Fourth Circuit noted, "although Congress created the private TCPA action, it was from the beginning a cause of action in the states' interest." *Int'l Sci.*, 106 F.3d at 1154. There is strong evidence that Congress wanted to assist state regulation in reaching interstate communications if a state so desired, not to create an independent regulatory framework for a potential flood of individual state-court lawsuits.

In sum, we do not believe the *Supremacy Clause* concerns and purported inefficiencies that some courts have perceived in adopting an "opt-out" approach are valid in light of the explicit statutory proviso and the TCPA's purpose to supplement state efforts to regulate unsolicited faxes. Instead, we consider the Congressional intent underlying the TCPA, as expressed in the statutory proviso and legislative history to favor the "opt-in" interpretation.

3. The "Opt-in" Interpretation

We must begin with the text of the statutory proviso. *See New York State Conf. of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655, 115 S. Ct. 1671, 131 L. Ed. 2d 695 (1995) (in determining congressional intent, analysis begins with interpretation of the statutory text and "moves on, as need be, to the structure and purpose of the Act in which it occurs"); *Mitchell Energy Corp. v. Ashworth*, 943 S.W.2d 436, 438, 40 Tex. Sup. Ct. J. 501 (Tex. 1997) (noting that in construing a statute, a court's primary objective is to give effect to the Legislature's intent by considering the plain meaning of the enactment). Our challenge in this case is discerning the level of deference to the states embodied in the phrase "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3).

We believe the requirement that states must "otherwise permit" a private right of action before a TCPA claim is cognizable in their courts can only mean that the TCPA alone does not create an immediately enforceable right. The term "otherwise" denotes "(1) in a different way or manner: DIFFERENTLY; (2) in different circumstances: under other

conditions." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961). And "permit" is defined as "(1) to consent to expressly or formally: grant leave for or the privilege of: ALLOW, TOLERATE; (2) to give (a person) leave: AUTHORIZE; . . . (4) to make possible." *Id.* Use of the words "otherwise permitted," then, suggests the necessity of affirmative state action to activate the TCPA's private cause of action.

Congressional intent underlying the TCPA also supports an "opt-in" reading of the statutory proviso. As we have said, the federal legislation was intended to supplement state regulation, and Congress was surely conscious that state courts could suddenly be burdened with a potential flood of unsolicited-fax suits. It is clear that Congress intended significant deference to states, allowing them to determine whether to entertain the private TCPA claims that Congress decided to make exclusively actionable in state court. *Int'l Sci.*, 106 F.3d at 1156.[8] We believe the "if otherwise permitted" language Congress crafted in creating the federal

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8. *International Science* has sometimes been cited to favor an "opt-out" interpretation of the TCPA's "if otherwise permitted" language. *See, e.g., Hooters*, 537 S.E.2d at 470. We do not read the court's analysis as doing so *International Science* was decided before the debate over the statutory proviso's import commenced and merely decided the jurisdictional question of whether federal courts could entertain private TCPA claims. *See R.A. Ponte Architects v. Investors' Alert*, 149 Md. App. 219, 815 A.2d 816, 824 n.7, *rev'd*, 382 Md. 689, 857 A.2d 1 (stating "the [Fourth Circuit] was not called upon to decide, and did not decide, whether 'unless otherwise permitted' means that states must 'opt-out' or 'opt-in' to Congress's grant of the private right of action"). Significantly, the Fourth Circuit never

(Cont'd)

TCPA private right of action indicates deliberate deference to an area of uniquely state concern. *Id.*

It is true, as the plaintiffs assert, that "the statute's intended and most important purpose [is] to swiftly 'wipe out unsolicited facsimile advertising." But we believe Congress hinged the swiftness of the federal legislation on the willingness of states to bear the burden and cost of overseeing these claims. After all, the TCPA provides a federal enforcement mechanism by which state attorneys general may protect residents if the state wishes to direct state resources elsewhere:

> If state residents would prefer their government to devote its attention and resources to problems other than those deemed important by Congress, they may choose to have the Federal Government rather than the State bear the expense [and administrative burden] of [the TCPA]. . . .Where Congress [thus] encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people.

(Cont'd)
noted the opt-in/opt-out dichotomy. In any event, it is not at all clear that *International Science* supports an "opt-out" interpretation, as language in the opinion can as well be read to support an "opt-in" interpretation. *Int'l Sci.*, 106 F.3d at 1150-52 (stating state-court jurisdiction over private suits is "subject to their consent," and that private actions may be brought in state court "so long as the states allow such actions").

Int'l Sci., 106 F.3d at 1158 (quoting *New York v. United States*, 505 US. 144, 168, 112 S. Ct. 2408, 120 L. Ed 2d 120 (1992)). Thus, that the Texas Legislature did not specifically authorize a private right of action for unsolicited faxes until 1999 does not mean that Texas residents were without recourse; they were free to encourage the Texas Attorney General to pursue TCPA injunctive and other relief on their behalf. *See* 47 USC. § 227(f)(1)-(2).

Plaintiffs further contend an "opt-in" interpretation would render the TCPA's preemption language meaningless. Section 227(e) provides that the TCPA does not preempt state laws imposing more restrictive requirements or even prohibiting the use of telemarketing equipment. 47 U.S.C. § 227(e). Plaintiffs claim the negative implication suggests that less restrictive penalties are indeed preempted. If the TCPA were inoperative absent enabling legislation, the plaintiffs assert, then the TCPA could not preempt less restrictive state law and the section would be rendered meaningless. Of course, the same argument would apply to the "opt-out" approach; if a state opted out then the preemption language would be equally meaningless. Only an "acknowledgment" interpretation, which we have rejected, would give fill effect to subsection (e) if in fact it were intended to preempt less restrictive state penalties. But we do not agree with the plaintiffs' reading of section 22 7(e).

First, we note that section 227(e)(1) is specifically titled "State law *not preempted*." 47 U.S.C § 227(e)(1,) (emphasis added). Furthermore, Congress's intent to supplement state legislation explains why the preemption concern would have focused on more aggressive regulation by the states. *See*

Chair King, 131 F.3d at 513 ("By creating a private right of action in state courts, Congress allowed states, in effect, to enforce regulation of interstate telemarketing activity."). Congress clearly did not intend the TCPA to establish a ceiling if states decided to be more aggressive in their approach, but it does not necessarily follow that Congress intended the TCPA to be a mandatory floor for private enforcement whether or not a state chose to allow it. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed 2d 700(1996) ("In all preemption cases, and particularly in those [where] Congress has 'legislated . . . in a field which the States have traditionally occupied,' we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"); *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767, 780, 67 S. Ct. 1026, 91 L. Ed. 1234 (1947) (internal citations omitted) ("Any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority, completely displacing the States."). We reject the plaintiffs' contention that the TCPA's limited preemption language forecloses an "opt-in" interpretation.

III. Conclusion

We conclude that, because Texas did not otherwise permit a cause of action for the receipt of unsolicited fax advertisements until September 1, 1999, and the faxes at issue in this case were sent before that date, plaintiffs have no actionable claim. Because this conclusion is dispositive, we do not reach the parties' other arguments involving the limitations period applicable to TCPA claims and the application of Texas agency law under the facts presented here. Accordingly, we reverse the judgment of the court of appeals and render judgment in favor of GTE Mobilnet.

Harriet O'Neill

APPENDIX B — OPINION OF THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON RENDERED MAY 6, 2004, SUBSTITUTE OPINION FILED MAY 6, 2004

COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT, HOUSTON

NO. 14-00-00711-CV

May 6, 2004, Rendered
May 6, 2004, Substitute Opinion Filed

THE CHAIR KING, INC., CHAIR KING, S.A., INC., JEROME KOSOY, M.D., M.E. FORD AND ASSOCIATES, BEAUTIQUE, INC., DISCOVERY SERVICES OF TEXAS, INC., VANTAGE SHOE WAREHOUSE, INC., COUNSELOR SYSTEMS, INC., POPE AND BOOTH, P.C., JEFFREY K. MUSKER, D.C., AND POPE ESCROW COMPANY,

APPELLANTS,

v.

GTE MOBILNET OF HOUSTON, INC. AND CHICK-FIL-A, INC.,

APPELLEES.

Appendix B

SUBSEQUENT HISTORY: Petition for review granted by *GTE Mobilnet of Houston, Inc. v. Chair King*, 2005 Tex. LEXIS 584 (Tex., Mar. 11, 2005) Reversed by *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 2006 Tex. LEXIS 97 (Tex., Feb. 3, 2006)

PRIOR HISTORY: On Appeal from the 152nd District Court. Harris County, Texas. Trial Court Cause No. 95-36004. *Chair King, Inc. v. GTE Mobilnet of Houston, Inc.*, 2004 Tex. App. LEXIS 780 (Tex. App. Houston 14th Dist., Jan. 29, 2004)

DISPOSITION: Motions for Rehearing Overruled; Affirmed in Part and Reversed and Remanded in Part.

COUNSEL: For Appellants: Julius Glickman, Thomas C. Wright, Chad M. Forbes, Houston, TX.

For Appellees: Anne Cohl Gravelle, Houston, TX, Jill Warren, Austin, TX, Kimberly Marie Phillips, Steve M. Zager, Houston, TX.

JUDGES: Panel consists of Justices Yates, Hudson, and Frost.

OPINIONBY: Kem Thompson Frost

Appendix B

OPINION
SUBSTITUTE OPINION

Opinion of January 29, 2004, Withdrawn and Substitute Opinion filed May 6, 2004.

We overrule the motions for rehearing filed by appellants and by appellee GTE Mobilnet of Houston, Inc. We withdraw the opinion issued in this case on January 29, 2004, and we issue the following opinion in its place.

This is a complicated case[1] in which we address several interesting and multi-faceted issues under the Telephone Consumer Protection Act, 47 U.S.C. § 227 ("TCPA"). Appellants, plaintiffs below, challenge the trial court's judgment dismissing their private damage claims under the TCPA and their common-law claims and granting appellees/defendants' no-evidence and traditional motions for summary judgment. We conclude that the trial court correctly granted summary judgment as to appellants' common-law claims, all of their claims against appellee Chick-Fil-A, Inc. ("Chick-Fil-A"), and the TCPA claims of appellants The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company. However, we reverse the trial court's judgment as to the TCPA claims of

1. In their appellate briefs, all parties assert that "this case is not complicated." The clerk's record in this summary-judgment appeal contains more than 14,700 pages. Taken together, the parties' appendices exceed 740 pages. In over 230 pages of appellate briefing, the parties have addressed more than a dozen legal issues, including one of apparent national first impression.

appellants Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. against appellee GTE Mobilnet of Houston, Inc. ("GTE Mobilnet") and remand these claims for further proceedings consistent with this opinion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Appellants The Chair King, Inc., Chair King, S.A., Inc., Jerome Kosoy, M.D., M.E. Ford and Associates, Beautique, Inc., Discovery Services of Texas, Inc., Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., Jeffrey K. Musker, D.C., and Pope Escrow Company (collectively referred to herein as the "Recipients") allege they are individuals or entities engaged in commercial, professional, or personal matters in and around various major metropolitan areas of Texas, including Houston, Dallas, San Antonio, and Austin. The Recipients assert that, from as early as 1992, they have received numerous unsolicited fax advertisements on their fax machines.

Some of the fax communications in question were disseminated by AdverFax, a now defunct company that was formerly in the business of sending out fax advertisements for other businesses.[2] AdverFax targeted recipients whom it perceived would be likely to buy its clients' products or services and then sent advertisements or coupons via fax to these targets. To facilitate its operations, AdverFax divided Houston into zones, each of which contained facsimile numbers for that geographic area. AdverFax maintained a

2. After the Recipients filed suit against AdverFax, AdverFax ceased its operations.

database containing fax numbers, sorted according to zone, which enabled AdverFax's customers to send faxed advertisements to all of the fax numbers in any chosen geographic zone. With its customers' authorization, AdverFax sent fax advertisements to the numbers in its database pertaining to the requested zones. The summary-judgment evidence shows that Adverfax sent out large numbers of faxed advertisements for its customers' products and services. In 1995, the Recipients filed suit against GTE Mobilnet in the United States District Court for the Sourthern District of Texas (the "Federal Suit"). Although the Recipients named several defendants (including GTE Mobilnet) in that suit, Chick-Fil-A was not among them. The United States Court of Appeals for the Fifth Circuit ultimately determined that the federal court lacked subject-matter jurisdiction. *See Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir.1997). The Federal Suit was then dismissed.

The Recipients filed this case in Harris County District Court in 1995. On March 11, 1998, the Recipients added GTE Mobilnet and Chick-Fil-A (collectively referred to herein as the "Advertisers") to this case, suing Chick-Fil-A for the first time. The Recipients alleged that numerous fax-advertising companies (including AdverFax) as well as the Advertisers and many other businesses who also retained these fax-advertising companies had sent unsolicited fax advertisements to the Recipients.[3] The Recipients asserted the following claims: (1) a private damage claim under the

3. The Recipients brought their claims seeking class-action certification for both a plaintiffs' class and a defendants' class. The trial court did not rule on the class-certification issue, and that issue is not before this court.

TCPA; (2) negligence; (3) negligence per se; (4) invasion of privacy; (5) trespass to chattels; and (6) gross negligence. The Recipients also alleged that the defendant advertisers had engaged in a conspiracy with their respective fax-advertising companies to send unsolicited fax advertisements.

The defendants filed a joint motion for summary judgment asserting the following grounds:

(1) The damages claims under the TCPA are barred because, at the time the faxes in question were sent, Texas had not authorized the filing of private damage claims under the TCPA in Texas courts;[4]

(2) The TCPA does not apply to any faxes sent solely within Texas;

(3) If the TCPA does apply to intrastate faxes, then Congress lacked the power to enact the TCPA under the *Commerce Clause of the United States Constitution*;

(4) The TCPA's minimum damages provision violates due process under the United States and Texas Constitutions because it is grossly disproportionate to any damage suffered by the Recipients;

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4. The Texas Legislature did enact such a statute, and it took effect on September 1, 1999. See Act of May 26, 1999, 76th Leg., R.S., ch. 635, § § 1-3, 1999 Tex. Gen Laws 3203 (codified at Tex. Bus. & Comm.Code § 35.47(c)-(g)). However, this statute does not apply to communications made before September 1, 1999. *See id.* at § § 2, 3.

(5) The TCPA violates the defendants' free-speech rights under the United States and Texas Constitutions;

(6) The TCPA violates the *Equal Protection Clause of the United States Constitution* because it unfairly discriminates against fax advertisements based on the content of their protected speech;

(7) The receipt of unsolicited fax advertisements does not constitute an invasion of privacy;

(8) The Recipients do not possess any right to privacy;

(9) Receipt of unsolicited fax advertisements does not constitute a trespass to chattels;

(10) The conduct about which the Recipients complain, as a matter of law, does not constitute negligence, gross negligence or negligence per se; and

(11) Because all of the Recipients' underlying claims fail, as a matter of law, their conspiracy claims also fail.

After the trial court denied this joint motion, GTE Mobilnet filed a separate motion for summary judgment and a supplemental motion asserting the following grounds:

(1) GTE Mobilnet allegedly did not send the faxes in question to the Recipients; rather they were sent by independently owned and operated agents;

(2) Jerome Kosoy, M.D. is a GTE Mobilnet customer so his consent to receive fax advertising from GTE Mobilnet is allegedly implied;

(3) The Recipients' claims are barred by the statute of limitations;

(4) There is no evidence GTE Mobilnet sent unsolicited fax advertisements to any of the Recipients; and

(5) There is no evidence to support the essential elements of the Recipients' common-law claims.

Chick-Fil-A also filed an individual motion for summary judgment and asserted the following grounds:

(1) The two-year statute of limitations under section 16.003 of the Texas Civil Practice and Remedies Code bars all of the Recipients' claims;

(2) Chick-Fil-A did not use its fax machines to send faxes to the Recipients and there was no agency relationship between Chick-Fil-A and the fax-advertising companies that sent faxes to the Recipients;

(3) There is no evidence to support the essential elements of the Recipients' common-law claims; and

(4) Chick-Fil-A is not liable for the actions of its independent franchisees.

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The Recipients filed responses to both the joint motion for summary judgment and the individual motions, and they also filed their own motion for a partial summary judgment relating to certain aspects of their TCPA claims against certain defendants, including the Advertisers.

After granting summary-judgment motions dismissing the Recipients' claims against certain defendants, the trial court reconsidered its ruling on the joint motion for summary judgment, granted the joint motion, and also granted the individual motions for summary judgment of the remaining defendants, including the Advertisers. The trial court also denied the Recipients' motion for partial summary judgment. Both in the trial court and on appeal, the Recipients settled with various defendants, so that only GTE Mobilnet and Chick-Fil-A remain as defendants/appellees in this case.

On appeal, the Recipients assert the trial court erred by granting the joint motion for summary judgment and the individual motions of GTE Mobilnet and Chick-Fil-A as well as by denying the Recipients' motion for partial summary judgment.

II. STANDARDS OF REVIEW

In reviewing a traditional motion for summary judgment, we take as true all evidence favorable to the non-movant, and we make all reasonable inferences in the non-movant's favor. *Dolcefino v. Randolph*, 19 S.W.3d 906, 916 (Tex.App.-Houston [14th Dist.] 2000, pet. denied). If the movant's motion and summary-judgment evidence facially establish its right to judgment as a matter of law, the burden shifts to

the non-movant to raise a genuine, material fact issue sufficient to defeat summary judgment. *Id.*

In reviewing a no-evidence motion for summary judgment, we ascertain whether the non-movant produced any evidence of probative force to raise a genuine issue of fact as to the essential elements attacked in the no-evidence motion. *Id.* We take as true all evidence favorable to the non-movant, and we make all reasonable inferences therefrom in the non-movant's favor. *Id.* A no-evidence motion for summary judgment must be granted if the party opposing the motion does not respond with competent summary-judgment evidence that raises a genuine issue of material fact. *Id.* at 917. Because the trial court did not specify the grounds for its ruling, we will affirm if any of the grounds advanced in the motion has merit. *See Carr v. Brasher,* 776 S.W.2d 567, 569 (Tex.1989).

We review the trial court's interpretation of applicable statutes *de novo. Johnson v. City of Fort Worth,* 774 S.W.2d 653, 655-56 (Tex.1989). In construing federal statutes, we look first at the language of the entire statute to determine if the language in question has a plain and unambiguous meaning regarding the issue before us. *See Barnhart v. Sigmon Coal Co.,* 534 U.S. 438, 450, 122 S.Ct. 941, 950, 151 L.Ed.2d 908 (2002). The inquiry stops if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *Id.* (quotations omitted). If the relevant statutory language is ambiguous and if no agency responsible for implementing the statute has interpreted the language, then we seek guidance in the statutory structure, relevant legislative history, and congressional purposes in

enacting the TCPA.[5] *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737, 105 S.Ct. 1598, 1603, 84 L.Ed.2d 643 (1985); *Blum v. Stenson*, 465 U.S. 886, 896, 104 S.Ct. 1541, 1548, 79 L.Ed.2d 891 (1984). We read the words of a statute in their context, taking note of their place in the overall statutory scheme. *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 1301, 146 L.Ed.2d 121 (2000) (citations and quotations omitted). In doing so, we must interpret the statute as a "symmetrical and coherent regulatory scheme" and, if possible, fit all parts into a "harmonious whole." *Id.* We must construe the language of the TCPA, if possible, so that no word is rendered meaningless or insignificant. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S.Ct. 441, 449, 151 L.Ed.2d 339 (2001).

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5. If an agency responsible for implementing the TCPA has interpreted the statutory language at issue, then the reviewing court gives deference to that agency's reasonable interpretation of the relevant language. *See United States v. Mead Corp.*, 533 U.S. 218, 227-28, 121 S.Ct. 2164, 2171-72, 150 L.Ed.2d 292 (2001). As explained below, we find that the Federal Communications Commission has not interpreted the language at issue in this case, so this aspect of the standard of review does not apply to this case.

Appendix B

III. ANALYSIS

A. Are the Recipients' TCPA damage claims barred because, at the time the faxes in question were sent, Texas had not authorized the filing of damage actions under the TCPA in Texas courts?

One of the Advertisers' grounds for summary judgment was that the Recipients' private damage claims under the TCPA are barred because the TCPA requires a state to authorize damage actions under the TCPA before these claims may be asserted. As noted above, Texas did not specifically authorize the filing of these private damage claims in its courts until September 1, 1999, and the statute containing this authorization does not apply to the fax advertisements in question because they were sent before September 1, 1999. *See* Act of May 26, 1999, 76th Leg., R.S., ch. 635, § § 1-3, 1999 Tex. Gen. Laws 3203 (codified at Tex. Bus. & Comm.Code § 35.47(c)-(g)). To frame our statutory analysis relating to this legal issue and the other TCPA issues before the court, we begin with an examination of the relevant language and the possible interpretations of this federal statute.

1. The Statutory Language and the Possible Interpretations

The first summary-judgment ground we must consider turns on the interpretation of the following statutory language, upon which the Recipients base their TCPA damage claim:

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Private right of action. A person or entity may, *if otherwise permitted by the laws or rules of court of a State,* bring in an appropriate court of that State-

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $500 in damages for each such violation, whichever is greater, or

(C) both such actions.

...

47 U.S.C. § 227(b)(3) (emphasis added).

In addition to providing this private right of action under section 227(b)(3), the TCPA also authorizes any state attorney general to bring civil actions on behalf of its state's residents to obtain an injunction against such unsolicited fax advertisements and to recover the same monetary damages that may be recovered under section 227(b)(3). *See* 47 U.S.C. § § 227(b)(3) & (f)(1). The TCPA provides that federal district courts have exclusive jurisdiction over actions brought by state attorneys general. 47 U.S.C. § 227(f)(2). Finally, the TCPA also authorizes the Federal Communications Commission ("FCC") to intervene as of right in any state attorney general's action. *See* 47 U.S.C. § 227(f)(3).

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Federal courts of appeals uniformly have determined that private TCPA damage claims may be brought only in state courts. *See Murphey v. Lanier,* 204 F.3d 911, 913-15 (9th Cir.2000) (agreeing with five other circuit courts of appeals that federal courts have no jurisdiction over private damage claims under the TCPA). The critical language in section 227(b)(3) is "if otherwise permitted by the laws or rules of court of a State." At least three different interpretations of this language have developed regarding the circumstances under which a claimant may bring a TCPA damage claim in state court. *See* Robert R. Biggerstaff, *State Courts and the Telephone Consumer Protection Act of 1991: Must States Opt In? Can States Opt Out?* 33 Conn. L.Rev. 407, 412-13 (2001). These three interpretations, which we refer to as "opt-in," "opt-out," and "acknowledgment," each produce different results when applied to the Recipients' TCPA claims.

The "Opt-In" Interpretation

Under the "opt-in" interpretation espoused by the Advertisers, private TCPA damage claims cannot be brought in a state's courts until that state's legislature enacts legislation or that state's highest court promulgates court rules that specifically permit these claims to be filed in that state's courts. *See Autoflex Leasing, Inc. v. Mfrs. Auto Leasing,* 16 S.W.3d 815, 817 (Tex.App.-Fort Worth 2000, pet. denied) (holding that, under plain meaning of 47 U.S.C. § 227(b)(3), TCPA damage claims cannot be asserted in a state's court until these claims are expressly permitted by state legislation or state court rule and that such claims may not be brought in Texas unless the alleged violation occurred

on or after September 1, 1999, when a statute took effect authorizing these claims). This view has been adopted by the only Texas court to address the issue. However, courts from nine other states have rejected the opt-in interpretation.[6] *See Lary v. Flasch Bus. Consulting*, No. 2020803, 878 So.2d ——, ——, 2003 WL 22463948, at *2-*5 (Ala.Civ.App. Oct.31, 2003) (holding that a state's legislative or judicial authorities need not "opt in" for the state's courts to entertain private damage claims under the TCPA); *Condon v. Office Depot, Inc.*, 855 So.2d 644, 645-48 (Fla.Dist.Ct.App.2003) (same); *Kaufman v. ACS Sys., Inc.*, 110 Cal.App.4th 886, 2 Cal.Rptr.3d 296, 306-12 (2003) (holding TCPA provides for private damage claims in state court unless prohibited by the state); *Reynolds v. Diamond Foods & Poultry, Inc.*, 79 S.W.3d 907, 908-10 (Mo.2002) (holding state enabling legislation is not required to assert private damage claims under the TCPA); *Zelma v. Market U.S.A.*, 343 N.J.Super. 356, 778 A.2d 591, 593-98 (2001) (holding no affirmative

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6. In support of their argument in this regard, the Advertisers also have cited an unpublished ruling by a United States District Court that state legislation authorizing TCPA damage claims is required before claimants in that state may file suit. *See Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1288 (11th Cir.1998) (describing district court "opt-in" ruling), modified in part by 140 F.3d 898 (11th Cir.1998). However, this ruling was vacated by the United States Court of Appeals for the Eleventh Circuit, which held that federal courts have no subject-matter jurisdiction over private damage claims under the TCPA. *See id.* at 1290. The Advertisers also cite dicta in Murphey v. Lanier, in which the Ninth Circuit, in the course of finding no federal jurisdiction over private damage claims under the TCPA, states that these claims can be litigated in state court only if the state consents. *See* 204 F.3d 911, 914 (9th Cir.2000).

act by legislature or highest state court was necessary for trial court to entertain private damage claims under the TCPA); *Worsham v. Nationwide Ins. Co.*, 138 Md.App. 487, 772 A.2d 868, 871-74 (2001) (stating, in context of damage action under 47 U.S.C. § 227(c)(5), which has same "if otherwise permitted" language, that state courts have jurisdiction over private TCPA claims in the absence of a state statute declining to exercise jurisdiction over TCPA claims); *Aronson v. Fax.com, Inc.*, 51 Pa. D. & C. 4th 421, 423-36 (Ct.Com.Pl.2001) (adopting "opt-out" rather than "opt-in" construction of 47 U.S.C. § 227(b)(3)); *Hooters of Augusta, Inc. v. Nicholson*, 245 Ga.App. 363, 537 S.E.2d 468, 470-71 (2000) (same as *Aronson*); *Schulman v. Chase Manhattan Bank*, 268 A.D.2d 174, 710 N.Y.S.2d 368, 370-72 (N.Y.App.Div.2000); *see also International Science & Tech. Inst. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1156-58 (4th Cir.1997) (same as *Aronson* in context of finding no subject-matter jurisdiction in federal court). If states do not need to affirmatively enact a statute or promulgate a court rule allowing private TCPA damage actions for claimants to file suit in state court, there are at least two other possible interpretations.

The "Opt-Out" Interpretation

Under a second interpretation, states may have the ability to "opt out" by passing a statute declining to entertain TCPA damage actions in that state's courts. *See International Science & Tech. Inst.*, 106 F.3d at 1156-58; *Hooters of Augusta, Inc.*, 537 S.E.2d at 470-71. This interpretation points to the concern about a potential flood of private TCPA actions in state courts, burdening state courts with exclusive

state-court jurisdiction over a federal damage claim that may have had no previous counterpart under state law. *See International Science & Tech. Inst.*, 106 F.3d at 1158 (stating that "[i]n creating a conditional right of action to enforce the TCPA in state courts, Congress neither exceeded its delegated powers nor invaded the province of state sovereignty, which still may be exercised to prohibit the action ... Congress enacted the TCPA to assist states where they lacked jurisdiction ... and it recognized state power to reject Congress' [sic] authorization").

The "Acknowledgment" Interpretation

Under a third interpretation, states may not "opt out" because the *Supremacy Clause of the United States* Constitution requires them to provide a judicial forum for prosecution of private TCPA damage claims. Under this interpretation, the language of the TCPA simply acknowledges the states' rights to structure their court systems and apply neutral state-court procedural rules. *See Schulman*, 710 N.Y.S.2d at 372 (concluding that "the phrase 'if otherwise permitted by the laws or rules of court of a State' merely acknowledges the principle that states have the right to structure their own court systems and that state courts are not obliged to change their procedural rules to accommodate TCPA claims"); Biggerstaff, *supra*, at 416-46. To date, it does not appear that any state has enacted a statute that explicitly refuses to allow private TCPA damage claims in that state's courts. *See* Biggerstaff, *supra*, at 416. The only court to date whose holding directly contradicts the acknowledgment interpretation is *R.A. Ponte Architects, Ltd. v. Investors' Alert, Inc. See* 149 Md.App. 219, 815 A.2d 816,

827 (2003) (holding that Maryland had "opted out" of TCPA damage claims by enacting in 1989-two years before the enactment of the TCPA-a state statute regarding unsolicited fax advertisements without allowing for private damage claims), *cert. granted,* 374 Md. 358, 822 A.2d 1224 (2003); *contra Condon,* 855 So.2d at 648 (holding Florida did not "opt out" of TCPA by, prior to enactment of TCPA, passing statutes regulating unsolicited fax advertisements without allowing for private damage claims); *and Hooters of Augusta, Inc.,* 537 S.E.2d at 471-72 (same as *Condon* for Georgia).

After scrutinizing the wording of the TCPA, we conclude that the relevant language of this statute does not have a plain and unambiguous meaning regarding the issues in this case. *See Barnhart,* 534 U.S. at 450, 122 S.Ct. at 950; *Condon,* 855 So.2d at 647 (stating that the "if otherwise permitted" language is ambiguous); Biggerstaff, *supra,* at 446 (stating that "significant ambiguity" exists in the statute); *but see Autoflex Leasing,* 16 S.W.3d at 817. Having found the relevant statutory language to be ambiguous, we now seek guidance in the relevant legislative history and consider the congressional purposes in enacting the TCPA. *See Florida Power & Light Co.,* 470 U.S. at 737, 105 S.Ct. at 1603.

2. Legislative History of the TCPA

From 1989 to 1991, Congress considered various bills addressing the telemarketing practices made possible by technological innovations, including the transmission of advertisements by fax, i.e., sending the advertisement in electronic form along a telephone line so that it is printed on paper at the receiving end. In the process, Congress held three

hearings and produced three committee reports. The final bill combined features of three previous bills. *Kaufman,* 2 Cal.Rptr.3d at 306-12.

In drafting the bills, Congress became aware of several problems associated with unsolicited fax advertisements. *See Telemarketing Practices: Hearing on H.R. No. 628, H.R. No. 2131, and H.R. No. 2184 Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Energy and Commerce,* 101st Cong., 1st Sess., at 54-57 (1989) (hereinafter "*Telemarketing Practices* "); H.R.Rep. No. 102-317, 1st Sess., at 25 (1991). "Since businesses [had] begun to express concern about the interference, interruptions and expenses that junk fax [es] ... placed upon them, states [were] taking action to eliminate these telemarketing practices. [Two states had] enacted laws banning the use of facsimile machines for unsolicited advertising. Similar bills [were] ... pending in the legislatures of about half the states." H.R.Rep. No. 102-317, 1st Sess., at 25 (1991).

"[State laws] had limited effect, however, because States do not have jurisdiction over interstate calls. Many States ... expressed a desire for Federal legislation to regulate interstate telemarketing calls to supplement their restrictions on intrastate calls." Sen. Rep. No. 102-178, 1st Sess., at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N., at 1970. "[B]usiness owners [were] virtually unanimous in their view that they [did] not want their fax lines tied up by advertisers trying to send messages." *Telemarketing Practices, supra,* at 54-55 (footnotes omitted). "Extensive research ... revealed no case of a company (other than those advertising via fax) which oppose[d] legislation restricting advertising via fax." *Id.* at

54 n. 35. As a state legislator from Utah put it, " 'You get a message you didn't want from people you don't know on paper they didn't buy.' " *Id.* at 54 (statement of Rep. Ken Jacobsen).

Richard Kessel, a New York state official, spearheaded the movement to ban unsolicited fax advertisements in his state after he was unable to fax a document to the governor's office which, at the time, was processing an incoming advertisement. *See Telemarketing Practices, supra,* at 55. "The last thing you want when you're trying to meet a deadline, or trying to get a memo to your boss ... is to be disturbed by someone trying to sell draperies or submarine sandwiches." *Id.* In hearings held in 1991, the co-founder of the Center for the Study of Commercialism, Michael Jacobson, described the "numerous nuisance faxes" he had received and complained that they "not only use the recipient's paper, but also prevent faxes from being sent out and prevent legitimate faxes from coming in." Hearing on Sen. No. 1462, Sen. No. 1410, and Sen. No. 857 *Before the Subcomm. on Communications of the Sen. Comm. on Commerce, Science, and Transp.,* 102d Cong., 1st Sess., 41 (1991) (statement of Michael Jacobson).

The legislative counsel for the American Civil Liberties Union, Janlori Goldman, told the House subcommittee, "we ... support the ... limits on fax machines, in terms of sending unsolicited advertising. We think that because of the burden that is placed on the individual who has to pay for the cost of the communication, that that then justifies [a] broader ban [than that placed on telephone solicitations]." *Telemarketing/Privacy Issues: Hearing on H.R. No. 1304 and H.R. No. 1305*

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Before the Subcomm. on Telecomms. and Fin. of the House Comm. on Energy and Commerce, 102d Cong., 1st Sess., at 47. The subcommittee was well aware that a "festering problem [had] arisen from the so-called 'junk fax.' Junk fax is more than merely irritating. It represents an unfair shifting of the cost of advertising from the advertiser to the unwitting customer.... [U]nsolicited and unwanted faxes can tie up a machine for hours and thwart the receipt of legitimate and important messages." *Id.* at 3-4.

Congress recognized that, although considered "[a]n office oddity during the mid 1980s, the facsimile machine has become a primary tool for business to relay instantaneously written communications and transactions." H.R.Rep. No. 102-317, 1st Sess., 10 (1991). By 1991, millions of offices in the United States were sending more than thirty billion pages of information by fax each year in an effort to speed communications and cut overnight delivery costs. *Id.* But "the proliferation of fax machines has been accompanied by explosive growth in unsolicited facsimile advertising, or 'junk fax.' " *Id.* at 10. "Facsimile machines are designed to accept, process, and print all messages ... The fax advertiser takes advantage of this basic design by sending advertisements to available fax numbers, knowing that [they] will be received and printed by the recipient's machine. This type of telemarketing is problematic for two reasons. First, it shifts some of the costs of advertising from the sender to the recipient. Second, it occupies the recipient's facsimile machine so that it is unavailable for legitimate business messages while processing and printing the junk fax." H.R.Rep. No. 102-317, *supra,* at 10. "[W]hen a facsimile machine is receiving a fax, it may require several

minutes or more to process and print the advertisement." *Id.* at 25. "Only the most sophisticated and expensive facsimile machines can process and print more than one message at a time." *Id.*

"When an advertiser sends marketing material to a potential customer through regular mail, the recipient pays nothing to receive the letter." *Id.* But the recipient of fax advertisements "assumes both the cost associated with the use of the facsimile machine and the cost of the expensive paper used to print out facsimile messages." *Id.* "[T]hese costs are borne by the recipient[s] of the fax advertisement regardless of their interest in the product or service being advertised." *Id.; see also* Sen. Rep. No. 102-178, 1st Sess., at 2 (1991), *reprinted in* 1991 U.S.C.C.A.N., at 1969.

Senator Ernest Hollings of South Carolina, the sponsor of the TCPA, in urging its passage, made the following statements regarding the civil damage provisions of the TCPA:

The ... [Act] contains a private right-of-action provision that will make it easier for consumers to recover damages from receiving these computerized calls. The provision would allow consumers to bring an action in State court against any entity that violates the [Act]. The [Act] does not, because of constitutional constraints, dictate to the States which court in each State shall be the proper venue for such an action, as this is a matter for State legislators to determine. Nevertheless, it is my hope that States will make it as easy as possible for consumers to bring such actions, preferably in small claims court.... Small claims court or a similar court

would allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purposes of the [Act] if the attorneys' costs to consumers of bringing an action were greater than the potential damages. I thus expect that the States will act reasonably in permitting their citizens to go to court to enforce this [Act].

137 Cong. Rec. S16205-16206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

Congress enacted the TCPA in November of 1991. The measure was signed into law on December 20, 1991. Section 227(b) of the Act makes it "unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The TCPA defines "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

3. The Advertisers' Arguments for the "Opt In" Interpretation

The Advertisers assert that Texas can permit private TCPA damage claims in its courts only by enacting legislation that specifically authorizes these claims. In support of this assertion, the Advertisers argue that the following substantiates the opt-in interpretation: (1) the *Autoflex*

Leasing, Inc. case; (2) Senator Hollings's remarks; (3) dictionary definitions; (4) other instances of the use of the phrase "otherwise permitted" in the United States Code; (5) Congress's ability to enact a clearer statute if it intended either the opt-out interpretation or the acknowledgment interpretation; and (6) the legislative history of the 1999 amendment to section 35.47 of the Texas Business and Commerce Code.

The Advertisers rely heavily on the *Autoflex Leasing, Inc.* case in which the Fort Worth Court of Appeals held that the "if otherwise permitted" language unambiguously requires a state to pass legislation or promulgate court rules allowing private TCPA damage actions before claimants may bring these claims in a state's courts. *See Autoflex Leasing, Inc.*, 16 S.W.3d at 817. After careful consideration of the language of the TCPA, the statutory structure, relevant legislative history, and the congressional purposes in enacting the TCPA, we respectfully disagree with the analysis of the *Autoflex Leasing, Inc.* court. *See Florida Power & Light Co.*, 470 U.S. at 737, 105 S.Ct. at 1603; *Blum*, 465 U.S. at 896, 104 S.Ct. at 1548. Instead, we conclude that the relevant language of the TCPA is ambiguous. *See Condon*, 855 So.2d at 647 (stating that the "if otherwise permitted" language is ambiguous); Biggerstaff, *supra*, at 446 (stating that "significant ambiguity" exists in the statute); *but see Autoflex Leasing*, 16 S.W.3d at 817. Furthermore, we do not find the federal cases cited by the *Autoflex Leasing, Inc.* court persuasive in resolving this issue.

Reviewing Senator Hollings's comments as a whole and in context, they do not address the issue of whether the opt-in interpretation is correct. *Condon*, 855 So.2d at 647-48;

Zelma, 778 A.2d at 596-97. Rather, Senator Hollings's comments show his concern about the bill's silence as to the proper state court in which claimants should bring TCPA damage claims and his hope that the states would make their small claims courts available for these claims so that a claimant might receive fast and efficient relief without having to retain a lawyer. *See Zelma*, 778 A.2d at 596-97; 137 Cong. Rec. S16205-16206 (daily ed. Nov. 7, 1991) (statement of Sen. Hollings).

Dictionary definitions do not clarify the ambiguity, but rather seem to confirm it. For example, one dictionary defines "permit" as "1: to consent to expressly or formally: grant leave for or the privilege of: Allow, Tolerate ... 2: to give (a person) leave: Authorize ..." Webster's Third New International Dictionary 1683 (1993 ed.). This definition seems to favor the Advertisers' position; however, it gives "allow" as a synonym and defines "allow" in pertinent part as meaning: "4: Permit ... a: to permit by way of concession ... b: to permit by neglecting to restrain or prevent ..." *Id.* at 58. The definition of this synonym weighs against the opt-in interpretation. The dictionary definitions show that the ordinary meaning of the relevant part of the TCPA is uncertain and that the TCPA does not unambiguously require states to expressly authorize TCPA damage claims.

The Advertisers also point to various federal statutes that contain the words "otherwise permitted" or "permitted" as support for the opt-in interpretation. However, the Advertisers do not cite any cases interpreting these statutes, and we do not find that the text of these statutes alone is helpful in interpreting the TCPA in this case. *See Zelma*, 778

A.2d at 595-96 (finding comparison of TCPA language with the language of other federal statutes not to be helpful).

The Advertisers also assert that, if Congress intended to achieve the results contemplated by the opt-out or acknowledgment interpretations, it could have done so directly and clearly by using other language. While this assertion is hardly debatable, it is also true that Congress could have more directly and clearly expressed any intent it had to require prior state authorization before allowing TCPA damage actions in state court. Therefore, this argument is neither convincing nor helpful in resolving the issue.

The Advertisers also cite part of the legislative history for the 1999 changes to section 35.47 of the Texas Business and Commerce Code, which states that "each state must decide whether to permit its citizens to bring civil actions for violations of the [TCPA]." House Research Org., Bill Analysis, Tex. H.B. 23, 76th Leg., R.S. (1999). First, this legislative history is consistent with both the opt-in and the opt-out interpretations.[7] Second, courts construing statutory language should give little weight to statements made by legislators after the enactment of the statute. *In re Jane Doe*, 19 S.W.3d 346, 352 (Tex.2000). Third, these statements regarding the TCPA were made eight years after its enactment

7. We note that at least one commentator has asserted that the Texas Legislature enacted the 1999 amendments to section 35.47 of the Texas Business and Commerce Code because Texas consumers had complained to the legislature that there was uncertainty about whether TCPA damage actions could be brought in Texas courts, rather than because it was considered necessary. *See Biggerstaff*, *supra*, at 409 n. 10.

by the research organization of the Texas House of Representatives, which was not involved in passage of the TCPA by the United States Congress. *See Sullivan v. Finkelstein*, 496 U.S. 617, 631, 110 S.Ct. 2658, 2667, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring in part) (stating that "post-enactment legislative history" is an oxymoron and should not be considered in interpreting statutes and that even the proponents of its use limit it to statements from members of the same legislative body that enacted the statute). For these reasons, we do not find this Texas legislative history relevant or helpful in the interpretation of the TCPA. Similarly, the FCC memorandum opinion cited by the Recipients does not weigh strongly for or against the opt-in interpretation and does not constitute an interpretation by the FCC of the statutory language at issue in this case.

After scrutinizing the language of the TCPA and considering the object sought to be obtained, the circumstances of the TCPA's enactment, the legislative history, and the consequences of the different interpretations, we agree with the courts from the nine other states that have declined to adopt the opt-in interpretation. *See Lary*, 878 So.2d at ——, ——, 2003 WL 22463948, at *2-*5; *Condon*, 855 So.2d at 645-48; *Kaufman*, 2 Cal.Rptr.3d at 306-12; *Reynolds*, 79 S.W.3d at 908-10; *Zelma*, 778 A.2d at 593-98; *Worsham*, 772 A.2d at 871-74; *Aronson*, 51 Pa. D. & C. 4th at 423-36; *Hooters of Augusta, Inc.*, 537 S.E.2d at 470-71; *Schulman*, 710 N.Y.S.2d at 370-72.

Congress sought to penalize and discourage unsolicited fax advertisements because they are an unwelcome source of annoyance, disruption, and expense to consumers. *See Telemarketing Practices, supra*, at 54-57; H.R.Rep. No. 102-

317, 1st Sess., at 25 (1991). Congress intended to help states regulate and penalize unsolicited fax advertisements by overcoming the states' inability to regulate interstate faxes. *See* Sen. Rep. No. 102-178, 1st Sess., at 3 (1991), *reprinted in* 1991 U.S.C.C.A.N., at 1970. By definition, this meant that no state statute allowed claimants to assert a damage claim based on unsolicited interstate faxes when the TCPA took effect. If we were to adopt the opt-in interpretation, that would mean that no private damage actions for unsolicited interstate faxes could be asserted in any state unless and until that state enacted an enabling statute. There is no apparent reason why Congress would structure TCPA damage actions in such an inefficient and ineffective manner. *See Aronson*, 51 Pa. D. & C. 4th at 429 (stating that there would be no reason why Congress would have created a statutory scheme in which it looked exclusively to the state courts to enforce private damage actions and in which, at the same time, Congress prevented states from entertaining these actions until each state passed an enabling statute, even though state courts otherwise would have been able to hear these federal claims). We reject the opt-in interpretation.

4. "Opt-Out" Versus "Acknowledgment" Interpretations

The acknowledgment interpretation, which would construe the TCPA to provide an unconditional private damage claim under federal law that must be asserted in state court and cannot be declined, creates a troubling incongruity. As shown below, the acknowledgment interpretation is inconsistent with the text of the TCPA, because it would make language in the TCPA doubly redundant.

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The supporters of the acknowledgment interpretation argue that the "if otherwise permitted" clause simply acknowledges that states have the right to structure their own court systems and are not required to change their neutral procedural rules to accommodate TCPA damage claims. *See Schulman,* 710 N.Y.S.2d at 370-72; Biggerstaff, *supra,* at 416-46. As courts of general jurisdiction, it is presumed that Texas district courts have the power to adjudicate private damage claims under federal statutes, unless the Texas Legislature or the United States Congress provide that they do not.[8] *See* U.S. Const., art. VI, cl. 2; Tex. Const. art. V, § 8; Tex. Gov't Code § § 24.007, 24.008; *Dubai Petroleum Co. v. Kazi,* 12 S.W.3d 71, 75 (Tex.2000). These principles are well-established under this country's federal system of government and under *the Supremacy Clause of the United States Constitution. See Howlett v. Rose,* 496 U.S. 356, 367-71, 110 S.Ct. 2430, 2438-41, 110 L.Ed.2d 332 (1990); *Dubai Petroleum Co.,* 12 S.W.3d at 75. There is no requirement that anything be stated in the federal statute for these principles to apply; as long as Congress duly enacts a statute

8. Statutes duly enacted by the United States Congress are as much laws in Texas as statutes enacted by the Texas Legislature. See *Howlett v. Rose*, 496 U.S. 356, 367-69, 110 S.Ct. 2430, 2438-39, 110 L.Ed.2d 332 (1990). Texas law and federal law form one system of jurisprudence, which together constitutes the law of the land for Texas. *See Howlett*, 496 U.S. at 367-69, 110 S.Ct. at 2438-39. Under the Supremacy Clause of the United States Constitution, the United States Constitution and duly-enacted federal statutes are "the supreme Law of the Land," and Texas courts have a responsibility to enforce that law according to their ordinary procedural rules. See U.S. Const., art. VI, cl. 2; *Howlett*, 496 U.S. at 367-69, 110 S.Ct. at 2438-39.

that it has the power to enact under the United States Constitution, these principles are triggered and state courts of general jurisdiction must entertain these claims unless the federal statute says otherwise or unless neutral state procedural rules that are not preempted prevent the assertion of a claim. *See Howlett,* 496 U.S. at 367-71, 110 S.Ct. at 2438-41. Therefore, Congress had no need to state these principles in the TCPA.

Further, the procedural matters mentioned by proponents of the acknowledgment interpretation are generally procedural law or rules relating to matters such as subject-matter jurisdiction, amount in controversy, or venue-all of which simply allow the state, by its neutral procedural rules, to decide which state court will hear the federal claim. *See* Biggerstaff, *supra,* at 418. While Congress might have wanted to include a provision in the statute that would confirm this reality, that confirmation is already accomplished by other language in the TCPA-"[a] person or entity may, if otherwise permitted by the laws or rules of court of a State, bring *in an appropriate court of that State* ..." 47 U.S.C. § 227(b)(3) (emphasis added). This italicized language unmistakably recognizes the constitutional realities that would apply anyway. It would be redundant and risk rendering the words meaningless to interpret the "if otherwise provided" clause to have the same meaning. *See TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 449, 151 L.Ed.2d 339 (2001) (stating that courts should construe the language of federal statutes, if possible, so that no word is rendered meaningless or insignificant).

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Given the language of the TCPA, the statute's purposes, the provision allowing state attorneys general to obtain the same remedies for their citizens that are available in the private damage actions, and Congress's reasonable and legitimate concern that it not overburden state court systems with potentially large numbers of private claims, we agree with the majority view that the opt-out interpretation is the correct one. Enabling legislation is not required, but a state may prohibit private TCPA damage actions in its courts. *See International Science & Tech. Inst.*, 106 F.3d at 1156-58; (explaining purposes of TCPA and why opt-out interpretation makes sense from a policy perspective); *Lary*, 878 So.2d 1158, —— & n. 2, 2003 WL 22463948, at *2-*5 & n. 2 (adopting opt-out interpretation and disapproving of acknowledgment interpretation); *Condon*, 855 So.2d at 645-48 (adopting opt-out interpretation); *Kaufman*, 2 Cal.Rptr.3d at 312 (holding that states can opt out of TCPA damage actions and that California has not done so); *Reynolds*, 79 S.W.3d at 910 (adopting opt-out interpretation); *Worsham*, 772 A.2d at 874; *Aronson*, 51 Pa. D. & C. 4th at 430 (adopting opt-out interpretation); *Hooters of Augusta, Inc.*, 537 S.E.2d at 471 (adopting opt-out interpretation); *but see Schulman*, 710 N.Y.S.2d at 372 (adopting acknowledgment interpretation); *Autoflex Leasing*, 16 S.W.3d at 817 (adopting opt-in interpretation).

One commentator who strongly supports the acknowledgment interpretation claims that it is preferable because courts should not construe a statute to alter a delicate constitutional balance without an explicit directive from Congress that this was intended. Biggerstaff, *supra*, at 426-33. The argument is that the opt-out interpretation upsets

the fragile balance of this country's federal system of government and threatens to undermine the Supremacy Clause. *See id.* But the federal system of government in our country is strong, and the opt-out interpretation gives effect to what its proponents conclude is the statutory directive from Congress under the Supremacy Clause. Rather than undermining the authority of federal law, this interpretation recognizes it as the supreme law of the land. If Congress decides that it is not satisfied with the results of its opt-out system for private TCPA damage claims in state courts, our federal lawmakers are free to make these claims mandatory in all state courts by amending the TCPA and preempting state statutes to the contrary.[9] For these reasons, we respectfully decline to adopt the acknowledgment interpretation. Instead, we hold that the Recipients may assert TCPA damage claims as long as Texas has not prohibited them from doing so.

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9. The same commentator suggests that if there are any constitutional problems relating to the acknowledgment interpretation arguably effecting a federal commandeering of state resources, these problems can be avoided by holding that federal courts and state courts have concurrent jurisdiction over private TCPA damage claims. *See Biggerstaff*, *supra*, at 446. This option is not available to this court because the Fifth Circuit already has determined that no federal jurisdiction is available to the Recipients. *See Chair King, Inc.*, 131 F.3d at 514. In any event, finding federal jurisdiction in this regard would be contrary to the holding of every federal court of appeals that has addressed this issue and would not result in a correct ruling.

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5. Section 35.47 of the Texas Business and Commerce Code

Before the enactment of the TCPA, Texas enacted a statute regulating certain unsolicited fax advertisements without providing for any private damage claim. *See* Act of May 23, 1989, 71st Leg., R.S., ch. 783, § 1, 1989 Tex. Gen Laws 3469, 3469-70. The effect, if any, of this prior statute on the ability of the Recipients to assert TCPA damage claims is not before us. In their primary argument on appeal, the Advertisers contend the trial court correctly granted summary judgment based on the opt-in interpretation. In the course of this argument, the Advertisers expressly reject the opt-out interpretation of the TCPA. However, in an alternative appellate argument, they assert that, as to faxes sent before September 1, 1999, Texas has opted out of the TCPA based on the 1989 unsolicited fax statute. *See* 1989 Tex. Gen Laws at 3469-70.

Although the Advertisers asserted in the trial court that there is no implied damage action under this statute, they did not assert as a summary-judgment ground any opt-out theory or any theory under which the 1989 unsolicited fax statute precludes the Recipients from asserting their TCPA damage claims. Therefore, this court cannot affirm the trial court's summary judgment on any such grounds because the Advertisers did not assert them in the trial court. *See Stiles v. Resolution Trust Corp.*, 867 S.W.2d 24, 26 (Tex.1993) (holding appellate court cannot affirm trial court's summary judgment on a ground not expressly stated in motion for summary judgment). We are limited to reviewing the ground that the Advertisers did assert-that the Recipients' claims are

barred because Texas did not authorize the filing of TCPA damage claims in Texas courts until September 1, 1999.[10] Accordingly, we conclude that the trial court erred by granting summary judgment based on its implied ruling that the Recipients' TCPA damage claims are barred under the opt-in interpretation.

B. Are the Recipients' TCPA damage claims barred because the TCPA does not apply to intrastate faxes?

The Recipients also assert that the trial court erred by impliedly granting summary judgment based on the Advertisers' argument that the TCPA applies only to interstate facsimile advertisements. The Recipients argue that the TCPA applies to intrastate faxes based on its plain language. The Recipients are correct.

The TCPA regulates unsolicited telephone calls and fax communications. *See* 47 U.S.C. § 227. The TCPA amended the Communications Act of 1934. *See* 47 U.S.C. § 151 *et*

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10. Even if the Advertisers had asserted this ground in the trial court, there would be no merit in it, because the 1989 unsolicited fax statute does not constitute an opting out of private damage claims under the TCPA, which was enacted in 1991. *See Condon*, 855 So.2d at 648 (holding Florida did not "opt out" of TCPA by, prior to enactment of TCPA, passing statutes regulating unsolicited fax advertisements without allowing for private damage claims); *Hooters of Augusta, Inc.*, 537 S.E.2d at 471-72 (same for Georgia); but *see R.A. Ponte Architects, Ltd.*, 815 A.2d at 827 (holding Maryland opted out of TCPA by, prior to enactment of TCPA, passing statutes regulating unsolicited fax advertisements without allowing for private damage claims).

seq. Although the Communications Act contains an interstate only restriction, the TCPA itself contained a conforming amendment that expressly excepts the TCPA from the Communications Act's interstate-only restriction. *See* 47 U.S.C. § 152(b) (1994); *Texas v. Am. Blastfax, Inc.*, 121 F.Supp.2d 1085, 1088 (W.D.Tex.2000); *Omnibus Int'l, Inc. v. AT & T, Inc.*, 111 S.W.3d 818, 821-22 (Tex.App.-Dallas 2003, pet. granted, judgm't vacated w.r.m.); *Hooters of Augusta, Inc.*, 537 S.E.2d at 471-72 & n. 7. Under the TCPA, "[i]t shall be unlawful for any person within the United States ... to use any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine." 47 U.S.C. § 227(b)(1)(C). The statute defines the term "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." 47 U.S.C. § 227(a)(4).

Although the TCPA does not specifically state that it covers both interstate and intrastate faxes, section 227(b)(1)(C) applies to unsolicited faxes sent by any person in the United States, without limiting its scope to interstate faxes. *See* 47 U.S.C. § 227(b)(1)(C). Furthermore, in expressly excepting the TCPA from the interstate-only restriction of the Communications Act, the conforming amendment evinces a congressional intent that the TCPA apply to intrastate fax communications. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1088; *Omnibus Int'l, Inc.*, 111 S.W.3d at 821-22; *Hooters of Augusta, Inc.*, 537 S.E.2d at 471 (holding Congress expressed its intent to regulate both interstate and intrastate communications by excepting the

TCPA from interstate limitation of 47 U.S.C. § 152). The statutory scheme of the TCPA is coherent and consistent, and the language relevant to this issue is unambiguous. *See Barnhart,* 534 U.S. at 450, 122 S.Ct. at 950. Therefore, we hold that the TCPA applies to both interstate and intrastate facsimile advertisements. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1088; *Omnibus Int'l, Inc.,* 111 S.W.3d at 821-22; *Hooters of Augusta, Inc.,* 537 S.E.2d at 471. We find the trial court erred in granting summary judgment based on its implied ruling that the TCPA applies only to interstate faxes.

C. Does the TCPA fall outside Congress's power under the Commerce Clause?

The trial court also granted summary judgment based on its implied ruling that, if the TCPA applies to intrastate faxes, Congress lacks the power to enact the TCPA under the *Commerce Clause of the United States Constitution.*

First, Congress has authority to regulate intrastate faxes. This is because telephones and telephone lines-even when used solely for intrastate purposes-are part of an aggregate interstate system and therefore are inherent instrumentalities of interstate commerce. *See United States v. Weathers,* 169 F.3d 336, 341 (6th Cir.1999) ("It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce") (emphasis omitted); *Am. Blastfax, Inc.,* 121 F.Supp.2d at 1087. Thus, Congress may regulate purely intrastate telephone activity to protect interstate commerce. *See United States v. Gilbert,* 181 F.3d 152, 158 (1st Cir.1999) (discussing the "long standing" line of cases holding Congress may regulate purely

intrastate telephone activity under the Commerce Clause); *Pavlak v. Church*, 727 F.2d 1425, 1427 (9th Cir.1984) ("Federal jurisdiction over purely intrastate communications under the Federal Communications Act derives from Congress' plenary power to regulate interstate commerce through regulating the means of such commerce.... Since the telephone is an instrumentality of interstate commerce, Congress has plenary power under the Constitution to regulate its use and abuse") (citations and quotations omitted); *see also United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 626 (1995) (stating "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"). Congress has the requisite power to regulate intrastate faxes and was not acting beyond its powers in enacting the TCPA. Indeed, to hold otherwise would undermine well-established federal law in other areas. *See, e.g., Alley v. Miramon*, 614 F.2d 1372, 1379 (5th Cir.1980) (stating "[t]his court has consistently held that the intrastate use of the telephone may confer jurisdiction over a private action under Section 10(b) and Rule 10b-5 [of the federal securities laws]"). Accordingly, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA falls outside the power granted to Congress in the *Commerce Clause of the United States Constitution*. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1087-88 (holding Commerce Clause challenge to TCPA failed).

D. Does the TCPA's minimum damage provision violate due process under the United States and Texas Constitutions on the ground that it is grossly disproportionate to any damage suffered by the Recipients?

The trial court also granted summary judgment based on its implied ruling that the TCPA's minimum damage award of $500 per fax violates due process under the *Due Process Clause of the Fifth Amendment to the United States Constitution* and under the *Due Course of Law Clause of the Texas Constitution*. *See* U.S. Const. amend. V; Tex. Const. art. I, § 16. Given the *Supremacy Clause of the United States Constitution*, it is unusual to have a federal statute challenged on state constitutional grounds; however, the Advertisers assert that Congress voluntarily made the Texas Constitution applicable to the TCPA by means of the TCPA's "if otherwise permitted" language. *See* U.S. Const., art. VI, cl. 2. For the sake of argument, we presume the Advertisers are correct. When, as in this case, the Advertisers have not argued that differences in state and federal constitutional guarantees are material to the case, and none are apparent, we limit our analysis to the *Fifth Amendment Due Process Clause* and presume that its protections are congruent with those of the *Texas Constitution's Due Course of Law Clause*. *See Bentley v. Bunton*, 94 S.W.3d 561, 579 (Tex.2002).

The Advertisers contend that the $500 minimum amount of damages per TCPA violation that a claimant may recover in a private damage action violates constitutional due process because this minimum amount is "grossly disproportionate" to any actual harm suffered by the Recipients. *See* 47 U.S.C.

§ 227(b)(3). A statutory penalty violates due process "only where the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mt. & S. Ry. Co. v. Williams,* 251 U.S. 63, 67, 40 S.Ct. 71, 73, 64 L.Ed. 139 (1919).

The Advertisers assert that the actual cost of receiving an unsolicited fax is two to forty cents per fax, yet the minimum damage amount is $500 per fax. But the TCPA damage provision was not designed solely to compensate each private injury caused by unsolicited fax advertisements. It also was intended to address and deter the overall public harm caused by such conduct. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1090. The TCPA damage amount was meant (1) to take into account the difficult-to-quantify business-interruption costs imposed upon recipients of unsolicited fax advertisements; (2) to deter the unscrupulous practice of shifting these costs to unwitting recipients of unsolicited fax advertisements; and (3) to give an adequate incentive for an individual claimant to bring suit on his own behalf. *See id.; Kenro, Inc. v. Fax Daily, Inc.,* 962 F.Supp. 1162, 1166 (S.D.Ind.1997).

The Supreme Court has stated that statutory damages designed to address such "public wrongs" need not be "confined or proportioned to [actual] loss or damages; for, as it is imposed as a punishment for the violation of a public law, the Legislature may adjust its amount to the public wrong rather than the private injury, just as if it were going to the state." *Williams,* 251 U.S. at 66-67, 40 S.Ct. at 73. In *Williams,* the Supreme Court found that the statute at issue, a fixed penalty for passenger overcharges, did not violate

due process. *See id.* In explaining its ruling, the Court stated: "[w]hen [the statute] is considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *Id.* The same is true here. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1091.

Congress identified two legitimate public harms intended to be addressed by the TCPA's ban on unsolicited fax advertisements: (1) these fax advertisements can substantially interfere with a business or residence because fax machines generally can handle only one message at a time, to the exclusion of other messages; and (2) unsolicited fax advertisements unfairly shift nearly all of the advertiser's printing costs to the recipient of the advertisement. *See Kenro,* 962 F.Supp. at 1167. The TCPA's $500 minimum damages provision, when measured against the overall harms of unsolicited fax advertising and the public interest in deterring this unwelcome conduct, is not "so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1091 (holding $500 minimum damage amount under TCPA does not violate due process); *Kenro,* 962 F.Supp. at 1166-67 (same); *ESI Ergonomic Solutions, LLC v. United Artists Theatre Circuit, Inc.*, 203 Ariz. 94, 50 P.3d 844, 850-52 (2002) (same); *Kaufman,* 2 Cal.Rptr.3d at 312 (same); *Harjoe v. Herz Fin.*, 108 S.W.3d 653, 654-55 (Mo.2003) (same). Accordingly, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA minimum damage amount violates constitutional due process.

E. Does the TCPA violate the Advertisers' free-speech rights under the United States and Texas Constitutions?

The trial court also granted summary judgment based on its implied ruling that the TCPA violated the Advertisers' free-speech rights under the United States and Texas Constitutions. Because the Advertisers have not shown how the text, history, or purpose of the Texas state constitutional provision affords them any greater protection than the First Amendment in the context of this case, even if the Texas Constitution applied to the TCPA, we still would apply the same analysis under the Texas Constitution and the First Amendment. *See Bentley*, 94 S.W.3d at 578.

The Advertisers contend the TCPA's ban on unsolicited fax advertisements is an impermissible regulation of commercial speech. *See* 47 U.S.C. § 227(a)(4) (defining "unsolicited advertisement" as "material advertising the commercial availability or quality" of goods and services). Because commercial speech occupies a "subordinate position in the scale of First Amendment values," a statute regulating commercial speech passes constitutional muster as long as it directly advances a substantial governmental interest in a manner that forms a "reasonable fit" with the interest. *See Board of Trustees of State Univ., N.Y. v. Fox*, 492 U.S. 469, 477-80, 109 S.Ct. 3028, 3033-35, 106 L.Ed.2d 388 (1989). The issue before this court is whether the TCPA's ban on unsolicited fax advertisements meets this standard.

A federal district court in Oregon was the first to address this issue. In *Destination Ventures, Ltd. v. F.C.C.*, 844 F.Supp. 632 (D.Or.1994), *aff'd* 46 F.3d 54 (9th Cir.1995), that court

found Congress's interest in preventing cost shifting " 'from the advertiser to the unwitting customer' " and in preventing fax machines from being tied up by unwanted messages was a substantial interest that is identified in the TCPA's legislative history. *See id.* at 637 (quoting TCPA House Report). We already have determined that these interests are sufficiently legitimate to justify the TCPA's $500 per-violation minimum damages provision. Furthermore, as the district court in *Destination Ventures* stated, "there were repeated, uncontradicted references made before Congress describing how facsimile advertising shifts economic burdens from the advertiser to the consumer ... Congress legitimately relied upon the testimony from authorities, as well as the contemporaneous state laws and media reports." *Id.* We find Congress's interests in passing the TCPA-preventing "unwitting customers" from bearing the brunt of advertising costs and preventing unwanted fax machine interference-are substantial and real. *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1091-92.

Inasmuch as Congress's interests in preventing the harms caused by unsolicited fax advertising are substantial and real, banning this advertising directly advances these interests. *See Destination Ventures*, 844 F.Supp. at 637 (stating that "[b]ecause Congress has addressed a substantial interest in protecting consumers from the economic harms inflicted through unsolicited advertisement faxes ... the subsequent banning of those unsolicited faxes directly advances that interest"). Thus, the only remaining inquiry is whether there is a "reasonable fit" between the TCPA's ban on unwanted fax advertisements and the interests directly advanced by the ban. *See Fox*, 492 U.S. at 480-81, 109 S.Ct. at 3034-35. The

district courts in *Destination Ventures, Kenro,* and *Am. Blastfax, Inc.* considered and rejected as alternatives allowing recipients of unsolicited fax advertisements to place themselves on a "do not fax" list as well as placing time, length, and/or frequency limits on unsolicited fax advertising. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1092; *Kenro,* 962 F.Supp. at 1168-69; *Destination Ventures,* 844 F.Supp. at 638-39. We conclude there is a reasonable fit, no more extensive than necessary, between the TCPA's ban on unsolicited fax advertisements and the interests directly advanced by the ban. *See Missouri v. Am. Blast Fax, Inc.,* 323 F.3d 649, 652-59 (8th Cir.2003) (rejecting First Amendment challenge to TCPA ban on unsolicited fax advertisements); *Destination Ventures, Ltd. v. F.C.C.,* 46 F.3d 54, 56 (9th Cir.1995) (affirming district court holding that TCPA did not violate First Amendment); *Am. Blastfax, Inc.,* 121 F.Supp.2d at 1091-92; *Kaufman,* 2 Cal.Rptr.3d at 312-23; *Harjoe,* 108 S.W.3d at 654-55; *Kenro,* 962 F.Supp. at 1167-69 (holding the mere existence of "imaginable alternatives" to the TCPA does not show the statute is improperly tailored); *but see Rudgayzer & Gratt v. Enine, Inc.,* 193 Misc.2d 449, 749 N.Y.S.2d 855, 857-60 (Civ.Ct.2002) (adopting analysis of *Missouri ex. rel. Nixon v. Am. Blast Fax, Inc.,* 196 F.Supp.2d 920 (E.D.Mo.2002), *rev'd by Am. Blast Fax,* Inc., 323 F.3d at 652-59, and holding that TCPA violates First Amendment).

The Advertisers also argue the TCPA violates the First Amendment because it lacks a scienter requirement for the $500 minimum damages provision. Generally, only statutes imposing criminal liability for dissemination of unprotected speech must contain a scienter element. *See New York v. Ferber,* 458 U.S. 747, 765, 102 S.Ct. 3348, 3358, 73 L.Ed.2d

1113 (1982); *Smith v. California*, 361 U.S. 147, 150-55, 80 S.Ct. 215, 217-19, 4 L.Ed.2d 205 (1959). The TCPA imposes no criminal liability. The only case the Advertisers cite in support of their contention that non-criminal statutes regulating commercial speech must have a scienter requirement is an Eighth Circuit case, *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir.1992). In that case, however, the court characterized the statute at issue, which prohibited the sale or rental of violent videos to minors, as "quasi-criminal in nature." *Id.* at 690. The TCPA is not a quasi-criminal statute, and we decline to extend First Amendment jurisprudence by requiring all non-criminal commercial speech regulations to include a scienter requirement.[11] *See Am. Blastfax, Inc.*, 121 F.Supp.2d at 1092 & n. 10. Accordingly, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA violates the Advertisers' free-speech rights under the United States and Texas Constitutions.

F. Does the TCPA violate the Equal Protection Clause of the United States Constitution?

The trial court also granted summary judgment based on its implied ruling that the TCPA violates the *Equal Protection Clause of the United States Constitution* because the statute's ban on unsolicited fax advertisements unfairly

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11. The Advertisers assert that this scienter argument was a separate summary-judgment ground that the Recipients did not attack on appeal; however, we conclude that the Recipients sufficiently assigned error in this regard in the First Amendment section of their appellate brief.

discriminates between commercial advertisements and noncommercial solicitations. The Advertisers argued in the trial court that strict scrutiny should be applied in evaluating this challenge because a fundamental right-freedom of speech-is involved.[12]

We have rejected the Advertisers' First Amendment challenge to the TCPA's ban on unsolicited fax advertisements; therefore, strict scrutiny is not applicable to the Advertisers' equal-protection claim on the basis that a First Amendment right is involved. *See Dunagin v. City of Oxford,* 718 F.2d 738, 752 (5th Cir.1983) (stating that "[i]n this case we have held the Mississippi law entirely legal under the First Amendment, and parties cannot insist on strict scrutiny merely by asserting a First Amendment right that the court ultimately finds not to be violated"). No other fundamental right or suspect class is implicated by the Advertisers' equal-protection challenge. *See Am. Blastfax, Inc.,* 121 F.Supp.2d at 1093. We already have determined for First Amendment purposes that a "reasonable fit" exists between the TCPA's identified interests and the means used to protect these interests. This same analysis is sufficient to satisfy the equal-protection rationality review. *See Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 344 n. 9, 106 S.Ct. 2968, 2978 n. 9, 92 L.Ed.2d 266 (1986) (stating "[i]f there is a sufficient 'fit' between the legislature's means and ends to satisfy the concerns of the *First Amendment*, the same 'fit' is surely adequate under the applicable 'rational basis' equal protection analysis").

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12. The Advertisers have not addressed their equal-protection challenge on appeal.

Further, because Congress has substantial and valid interests in protecting "unwitting customers" from unsolicited fax advertisements, the TCPA's distinction between commercial and noncommercial advertising is quite rational. *See Destination Ventures,* 844 F.Supp. at 639; *Am. Blastfax, Inc.,* 121 F.Supp.2d at 1093. Therefore, we find the trial court erred in granting summary judgment based on its implied ruling that the TCPA violates the *Equal Protection Clause of the United States Constitution.*

G. Did the Advertisers conclusively prove their entitlement to judgment as a matter of law on their statute-of-limitations defense?

In their individual motions for summary judgment, both GTE Mobilnet and Chick-Fil-A asserted the statute of limitations as a bar to the Recipients' TCPA claims. The main issue presented by this challenge is whether the federal, four-year statute of limitations or state statutes of limitations apply to private TCPA actions. This appears to be an issue of first impression under the TCPA.

The Advertisers and the Recipients agree that the Recipients' common-law claims are governed by the two-year statute of limitations under section 16.003(a) of the Texas Civil Practice and Remedies Code. *See* Tex. Civ. Prac. & Rem.Code § 16.003(a). However, the Recipients assert that the residual, federal limitations period applies to their private claims under the TCPA. *See* 28 U.S.C. § 1658(a).

Appendix B

1. Chick-Fil-A

Chick-Fil-A asserts correctly that, as to the TCPA claims, this case involves a "reverse-*Erie* " situation, in which the substantive law is federal and the procedural law is that of Texas. *See, e.g., Exxon Corp. v. Choo,* 881 S.W.2d 301, 305-06 & n. 9 (Tex.1994) (discussing "reverse-*Erie* " situation involving a federal maritime claim in state court). Chick-Fil-A argues in part that, in this reverse-*Erie* situation, the Texas limitations period applies because statutes of limitations are procedural and Texas law supplies the procedure. To support its position, Chick-Fil-A cites to *Hill v. Perel,* 923 S.W.2d 636, 639 (Tex.App.-Houston [1st Dist.] 1995, no writ), a case holding that limitations is generally procedural in a case in a Texas court in which the substantive law of another state applies. As applied to the TCPA, Chick-Fil-A's argument lacks merit for two reasons.

First, if Congress has enacted a statute that requires a four-year limitations period for the federal claim asserted in this case, then that federal law would preempt any contrary state-law analysis. *See Anderson v. Diamond M-Odeco, Inc.,* 912 S.W.2d 371, 372-73 (Tex.App.-Houston [14th Dist.] 1995, writ dism'd by agr.) (holding three-year maritime-tort statute of limitations under 46 U.S.C. § 763a applies to maritime torts filed in state court).

Second, this argument fails to recognize a historical difference between limitations rules in two different contexts: (1) *Erie* and reverse-*Erie* situations, and (2) situations in which Texas courts apply the substantive law of a foreign jurisdiction, which does not include federal law. When Texas

courts apply foreign law from another state or country, the rule has been that the foreign jurisdiction supplies the substantive law, and Texas supplies the procedural law, and this procedural law has been held to include the statute of limitations, unless the statute that created the claim contains an express limitations period. *See Hill*, 923 S.W.2d at 639. However, in *Erie* and reverse-*Erie* situations, courts have determined that, rather than decide the potentially difficult issue of whether limitations is procedural or substantive, the rule should simply be that the limitations period comes from the same source as the substantive law. *See Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 108-11, 65 S.Ct. 1464, 1469-71, 89 L.Ed. 2079 (1945) (holding that, in *Erie* situation-diversity claim in federal court-regardless of whether statutes of limitations are procedural or substantive, state statutes of limitations apply to maintain uniformity of outcomes among similar claims, regardless of whether they are brought in state court or federal court); *Engel v. Davenport*, 271 U.S. 33, 39, 46 S.Ct. 410, 413, 70 L.Ed. 813 (1926) (holding that limitations period in federal statute that governed personal-injury claim applied to state-court claim under that statute rather than state limitations period). This difference in the law has been diminished somewhat by the Texas Legislature's fairly recent enactment of a statute adopting the foreign state or country's statute of limitations for personal-injury or death claims under foreign law in Texas courts, if the claimant is not a resident of Texas. *See* Act of May 27, 1997, 75th Leg., R.S., ch. 424, § 3, 1999 Tex. Gen Laws 1680, 1683 (codified at Tex Civ. Prac. & Rem Code § 71.031(a)(3)). In any event, even if we were to conclude that statutes of limitations are "procedural," that would not answer the question now before us. Instead, we must interpret and apply the federal statute the Recipients claim governs this case. That statute states:

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Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues.

28 U.S.C. § 1658(a).

The Recipients' TCPA claims arise under an act of Congress, the TCPA. Congress enacted the TCPA after it enacted section 1658(a). *See* 47 U.S.C.A. § 227; 28 U.S.C.A. 1658. Therefore, the four-year statute of limitations in section 1658(a) applies to the TCPA claims unless another law provides otherwise. *See* 28 U.S.C. § 1658(a).

Chick-Fil-A asserts that another law-47 U.S.C. § 227(b)(3)-does provide otherwise because that statute specifies that private damage claims may be brought in state court "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3). This is a difficult issue and one of apparent first impression in the United States. After careful study and examination, we agree with Chick-Fil-A's position. Under the opt-out interpretation of section 227(b)(3) that we now have adopted, parties may assert private TCPA claims in an appropriate state court if state law permits. Therefore, if Texas limitations law does not permit the Recipients to pursue their claims against Chick-Fil-A, then the Recipients' claims are not "otherwise permitted" by Texas law.

Though Congress could have enacted a TCPA private damage claim with a four-year federal limitations period, our federal lawmakers had the flexibility and discretion to enact

a statute that allows states to exercise control over these federal claims in the state-court system. In this way, if these claims are not a burden on the state's judicial system, then the state need not take any action. Conversely, if the TCPA claims start to become a burden on the state-court system, either due to unmanageable quantities or because of increased scarcity of resources in the state's judicial system, then the TCPA allows states to take responsive action either by closing their courts to these claims or by shortening the limitations period to reduce the number of claims its judicial system must handle. State attorneys general still would be able to obtain the same relief in federal court, and this might be a more efficient arrangement in the judgment of some states. Given the TCPA's language, the congressional purposes in enacting it, and the statute's legislative history, we cannot conclude that Congress intended to force the states to hear these private TCPA claims with a long four-year limitations period, when many states have a one-year or two-year limitations period for tort claims. *See International Science & Tech. Inst.*, 106 F.3d at 1157 (stating that "concerned over the potential impact of private actions on the administration of state courts, Congress included a provision to allow the states to prohibit private TCPA actions in their courts. We have no doubt that Congress has a legitimate interest in not overburdening state and federal courts [or] that Congress has a legitimate interest in respecting the states' judgments about when their courts are overburdened"). Therefore, we conclude that the residual four-year federal limitations statute does not apply to private TCPA claims.

Under Texas law, if the Texas Supreme Court has not held that a tort is governed by a statute of limitations other than section 16.003(a) of the Texas Civil Practice and

Remedies Code and if that tort is not expressly covered by a statute of limitations, then we presume the tort is a "trespass" that is covered by the two-year statute of limitations of section 16.003(a). *See* Tex. Civ. Prac. & Rem.Code § 16.003(a); *Williams v. Khalaf*, 802 S.W.2d 651, 654 (Tex.1990); *Almazan v. United Services Automobile Assoc.*, 840 S.W.2d 776, 779-80 (Tex.App.-San Antonio 1992, writ denied) (applying *Khalaf* presumption regarding section 16.003(a) to statutory tort based on wrongful dismissal for filing workers' compensation claim). The Recipients' private TCPA claims are tort claims. Further, because the Texas Supreme Court has not held that private TCPA claims are governed by a statute of limitations other than section 16.003(a) and because such claims are not expressly covered by a statute of limitations, we presume that private TCPA claims are covered by section 16.003(a). *See* Tex. Civ. Prac. & Rem.Code § 16.003(a); *Williams*, 802 S.W.2d at 654; *Almazan*, 840 S.W.2d at 779-80. This presumption has not been overcome. We conclude that the Recipients' private TCPA claims are covered by the language of section 16.003(a)'s two-year statute of limitations. *See* Tex. Civ. Prac. & Rem.Code § 16.003(a) (stating that two-year statute of limitations covers, among other things, "trespass for injury to the estate or to the property of another, conversion of personal property, taking or detaining the personal property of another, personal injury...."); *Almazan*, 840 S.W.2d at 779-80 (holding statutory tort based on wrongful dismissal for filing workers' compensation claim is governed by section 16.003(a)'s two-year statute of limitations rather than by the residual four-your statute of limitations); *Collins v. Collins*, 904 S.W.2d 792, 804 (Tex.App.-Houston [1st Dist.] 1995) (holding claim under Texas wiretap statute is governed by

section 16.003(a)' s two-year statute of limitations rather than by the residual four-your statute of limitations) (en banc), *writ denied*, 923 S.W.2d 569 (Tex.1996). Thus, we evaluate the timeliness of the Recipients' TCPA claims by calculating whether they were brought within two years of accrual.

The type of TCPA claim asserted by the Recipients accrues when the defendant sends an unsolicited advertisement to the plaintiff's fax machine. *See* 47 U.S.C. § 227(b)(1)(C), (b)(3). The parties do not dispute that the Recipients sued Chick-Fil-A for the first time on March 11, 1998. The Recipients have not cited, and this court has not found, any summary-judgment evidence raising a genuine issue of material fact as to whether the Recipients received any fax advertisement from Chick-Fil-A on or after March 11, 1996. The only evidence on this point shows that all of the fax advertisements Chick-Fil-A allegedly sent to the Recipients were sent before March 11, 1996, which is more than two years before the Recipients filed suit against Chick-Fil-A. Accordingly, we conclude that the trial court acted correctly in granting Chick-Fil-A's motion for summary judgment based on limitations, and we overrule the Recipients' issue on appeal to the extent that it challenges the take-nothing judgment in favor of Chick-Fil-A.

2. GTE Mobilnet

GTE Mobilnet also moved for summary judgment on the ground that the statute of limitations barred the Recipients' TCPA claims. However, the record shows that the Recipients' action against GTE Mobilnet (the Federal Suit) was dismissed for lack of jurisdiction on January 12,

1998, and that the Recipients brought suit against GTE Mobilnet in this case 58 days later, on March 11, 1998. Therefore, under Texas limitations law, the date of filing as to the claims against GTE Mobilnet relates back to April 12, 1995-the date the Recipients filed the Federal Suit against GTE Mobilnet. *See* Tex. Civ. Prac. & Rem.Code § 16.064. None of the fax advertisements in the record on which the Recipients base their claims against GTE Mobilnet were sent before April 12, 1993. Therefore, the trial court erred in granting summary judgment based on its implied ruling that the Recipients' claims against GTE Mobilnet were barred by limitations.

H. Did the trial court err by granting GTE Mobilnet summary judgment based on its assertion that independently owned and operated agents, rather than GTE Mobilnet, sent the faxes in question?

The trial court also granted summary judgment based on its implied ruling that GTE Mobilnet's independently owned and operated agents, rather than GTE Mobilnet, sent the GTE Mobilnet fax advertisements. In support of GTE Mobilnet's motion for summary judgment, Jeffrey L. Sicard testified by affidavit that he is a general manager for GTE Mobilnet and that the fax advertisements in question relating to GTE Mobilnet "were not sent by GTE Mobilnet of Houston, Inc., but were sent by independently owned and operated agents." Applying the familiar standards of review for summary judgment, this affidavit by itself raised a genuine issue of material fact as to whether GTE Mobilnet used any telephone facsimile machine, computer, or other device to send an unsolicited advertisement to one or more of the Recipients.

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The TCPA does not require that GTE Mobilnet or its employees be the ones to actually send unsolicited fax advertisements for liability to attach. *See Hooters of Augusta, Inc.*, 537 S.E.2d at 472; *see also Worsham*, 772 A.2d 868, 877-79 (stating, in context of damage action under 47 U.S.C. § 227(c)(5), that under TCPA, defendant still can be liable, even if independent contractor made the call on defendant's behalf). Under the TCPA, "the entity or entities on whose behalf facsimiles are transmitted are ultimately liable for compliance with the [TCPA's] rule banning unsolicited facsimile advertisements." *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC Release No. 95-310, 10 F.C.C. Rcd. 12391, 12407 (Aug. 7, 1995). Parties wishing to send unsolicited fax advertisements in violation of the TCPA should not be able to avoid liability simply by having the transmission executed by an independent contractor. *Hooters of Augusta, Inc.*, 537 S.E.2d at 472. A reasonable inference from Sicard's affidavit would be that GTE Mobilnet and its employees did not send the faxes in question but that one of GTE Mobilnet's independent agents sent these faxes. *See Dolcefino*, 19 S.W.3d at 916. Therefore, we conclude that there is a genuine issue of material fact as to whether the fax advertisements in question were sent by someone acting on behalf of GTE Mobilnet. *See Worsham*, 772 A.2d at 878-79 (finding fact issue under TCPA as to whether phone calls were made on behalf of defendant).[13] Accordingly, we

13. GTE Mobilnet also cites a second affidavit from Sicard that was filed in response to the Recipients' motion for partial summary judgment. Sicard's first affidavit already raises a fact issue, and that fact issue cannot be erased by Sicard filing a second affidavit. Further, it is not clear that the second Sicard affidavit speaks to GTE Mobilnet

(Cont'd)

conclude the trial court erred to the extent that it impliedly ruled that GTE Mobilnet was entitled to summary judgment based on its assertion that independently owned and operated agents, rather than GTE Mobilnet, sent the GTE Mobilnet fax advertisements.

I. Did the Recipients raise a genuine issue of material fact in response to GTE Mobilnet's assertion that there is no evidence GTE Mobilnet sent unsolicited fax advertisements to any of the Recipients?

GTE Mobilnet filed no-evidence motions for summary judgment directed to the claims of certain of the Recipients. We now consider the propriety of the trial court's implied rulings granting these motions.

1. The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company

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(Cont'd)
at all because it defines "GTE Mobilnet" in a way that seems to refer to GTE Mobilnet of South Texas Limited Partnership rather than to defendant/appellee GTE Mobilnet of Houston Inc. Although the second affidavit does state that the fax advertisements were not sent by "GTE Mobilnet" or on its behalf or at its request, this statement alone is conclusory and insufficient to support summary judgment in favor of GTE Mobilnet. *See Anderson v. Snider*, 808 S.W.2d 54, 55, 34 Tex. Sup. Ct. J. 516 (Tex.1991). Lastly, although the second affidavit states that the fax advertisements in question appear to have been sent by independent contractors, this is not sufficient to entitle GTE Mobilnet to summary judgment. *See Worsham*, 772 A.2d 868, 877-79; *Hooters of Augusta, Inc.*, 537 S.E.2d at 472.

Appendix B

The following parties did not adduce any summary-judgment evidence showing that they received any fax advertisements from GTE Mobilnet: The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company. Based on these parties' failure to raise a genuine issue of material fact as to whether they received any unsolicited fax advertisement from GTE Mobilnet, we conclude that the trial court properly granted summary judgment as to all of these parties' claims against GTE Mobilnet.

2. Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., hand Jeffrey K. Musker, D.C.

As to Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C., we conclude that these four parties raised genuine issues of material fact as to whether GTE Mobilnet sent them unsolicited fax advertisements. In their affidavits, these parties asserted that the fax advertisements appended as attachments (which include advertisements for GTE Mobilnet) were sent to them by the defendants, a group that includes GTE Mobilnet. This evidence and the first affidavit of Jeffrey Sicard (discussed in section H., above) raise a genuine issue of material fact as to the elements of these parties' private TCPA claims. Therefore, the trial court erred to the extent it granted summary judgment as to the TCPA claims of Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C.

Appendix B

3. Jerome Kosoy, M.D.

As an additional ground for summary judgment as to Jerome Kosoy, M.D.'s claims, GTE Mobilnet asserted that it presumptively had permission to send him fax advertisements because it was not disputed that, at all relevant times, Kosoy was a customer of GTE Mobilnet. The TCPA prohibits sending fax advertisements to a person without that person's "prior express invitation or permission." *See* 47 U.S.C. § § 227(a)(4) and (b)(1)(C). The FCC has stated that "facsimile transmission [sic] from persons or entities who have an established business relationship with the recipient can be deemed to be invited or permitted by the recipient." *See* 7 F.C.C.R. 8752, n. 87, 1992 WL 690928 (1992). This notion of deeming permission is based on an inference and, as such, seems to conflict with the TCPA's requirement that the invitation or permission be express. *See* 47 U.S.C. § 227(a)(4). Characterizing permission granted by implication as "express" runs afoul of the plain meaning of the word. Generally, "express" means "clearly and unmistakably communicated; directly stated." Black's Law Dictionary 601 (7th ed.1999); *see also Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 192-93, 200, 205-06 (Tex.2001) (equating "express" with "states with unmistakable clarity" and with "clearly and unequivocally states"). Kosoy testified that he did not give prior express invitation or permission to the defendants (which includes GTE Mobilnet) to send the fax advertisements attached to his affidavit. Kosoy testified he did not want to receive these unsolicited fax advertisements and that he did not give prior express invitation or permission to GTE Mobilnet to send them. Under the applicable standard of review, we find that Kosoy raised a genuine issue of material fact as to whether he gave prior express invitation or permission.

Appendix B

J. Did the Recipients raise a genuine issue of material fact in response to GTE Mobilnet's assertion that there is no evidence to support their common-law claims against GTE Mobilnet?

In addition to granting summary judgment on the Recipients' TCPA claims, the trial court also granted summary judgment in favor of GTE Mobilnet on the Recipients' common-law claims. We now consider the Recipients' challenges to these rulings.

1. Invasion of Privacy

As to the intrusion-upon-seclusion invasion-of-privacy claims, we conclude that the trial court properly granted summary judgment as to the claims of Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. against GTE Mobilnet. Certainly, sending unauthorized fax advertising may constitute invasion of privacy in some circumstances. *See International Science & Tech. Inst.,* 106 F.3d at 1150 (discussing legislative history of TCPA that states TCPA seeks to protect the privacy interests of residential telephone subscribers by restricting unsolicited phone and fax calls). However, as to Beautique, Inc. and Discovery Services of Texas, Inc., there is no Texas authority recognizing a corporation's right to solitude, seclusion, or privacy, and we decline to recognize one here. *See Express One Int'l, Inc. v. Steinbeck,* 53 S.W.3d 895, 900 (Tex. App.-Dallas 2001, no pet.) (stating no Texas authority recognizes a corporation's right to privacy).

Further, the two elements of this claim are: (1) an intentional intrusion, physically or otherwise, upon another's solitude, seclusion, or private affairs or concerns, (2) that would be highly offensive to a reasonable person. *Valenzuela v. Aquino,* 853 S.W.2d 512, 513 (Tex.1993). The summary-judgment evidence does not raise a genuine issue of material fact on either element for the claims of the individual claimants Jerome Kosoy, M.D. and Jeffrey K. Musker, D.C. According to Kosoy's affidavit, the address at which his fax machine is located contains a suite number, indicating an office address. In any event, neither claimant describes the circumstances surrounding his receipt of the fax advertisements in question. Neither describes the location of the fax machine or the expectation of solitude, seclusion, or privacy that he claims relating to this fax machine. Both failed to provide details regarding the facts that might bear on the offensiveness of GTE Mobilnet's alleged conduct.

On this record, we conclude the trial court correctly granted summary judgment against these four claimants regarding their invasion-of-privacy claims. *See Express One Int'l, Inc.,* 53 S.W.3d at 900-01 (affirming summary judgment where claimant did not adduce evidence raising fact issue as to invasion-of-privacy claim).

2. Trespass to Chattels

As to the trespass-to-chattels claim, for liability to attach, the wrongful interference with the chattel must have caused actual damage to the property or deprived the owner of its use for a substantial period. *See Zapata v. Ford Motor Credit Co.,* 615 S.W.2d 198, 201 (Tex.1981); *Omnibus Int'l,*

Inc., 111 S.W.3d at 826. Applying the familiar standard of review, we conclude Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. did not raise a genuine issue of material fact in this regard. Accordingly, the trial court correctly granted summary judgment as to the trespass-to-chattels claim. *See Omnibus Int'l, Inc.*, 111 S.W.3d at 826.

3. Negligence, Negligence Per Se, and Gross Negligence

As to the negligence and negligence per se claims, Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. have not adduced any evidence giving rise to a common-law negligence duty regarding the alleged actionable conduct. Furthermore, under the negligence per se analysis established by the Texas Supreme Court, this case does not involve a claim deriving the duty from the common law, and so, we conclude that this is not an appropriate case for negligence per se. *See Perry v. S.N.*, 973 S.W.2d 301, 306-07 (Tex.1998). As to the gross negligence allegation, applying the familiar standard of review, we find no evidence that GTE Mobilnet engaged in grossly negligent conduct. Accordingly, the trial court correctly granted summary judgment as to these claims.

4. Civil Conspiracy

A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose or to accomplish a lawful purpose by unlawful means. *Firestone Steel Products Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex.1996). The "gist

of a civil conspiracy" is the injury the conspirators intend to cause. *Id.* Civil conspiracy requires specific intent. *Id.* For a civil conspiracy to arise, the parties must be aware of the harm or the wrongful conduct at the beginning of the combination or agreement. *Id.* Reviewing the record under the applicable standard of review, we find no evidence that Adverfax and GTE Mobilnet had a meeting of the minds and knew that damage would result from sending unsolicited fax advertisements to any of the Recipients. Accordingly, we find the trial court correctly granted summary judgment on this issue.

In sum, we conclude that the trial court correctly granted summary judgment against Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. as to all of their common-law claims.

K. Can the Recipients appeal from the trial court's denial of the motion for partial summary judgment?

The Recipients' motion for partial summary judgment did not seek a final judgment. Therefore, we lack appellate jurisdiction to review the trial court's denial of this motion. *See CU Lloyd's of Texas v. Feldman,* 977 S.W.2d 568, 569 (Tex.1998) (stating that, before a court of appeals may review an order denying a cross motion for summary judgment not covered by an interlocutory appeal statute, both parties must have sought final judgment in their cross motions for summary judgment, unless an exception applies that involves declaratory relief). Because we may not address an issue not properly before this court, we do not consider the trial court's denial of the Recipients' motion for partial judgment in this appeal.

IV. CONCLUSION

The opt-out interpretation of the "if otherwise permitted" phrase is most consistent with the language, articulated goals, and legislative history of the TCPA. Therefore, the trial court erred by impliedly granting summary judgment based on the opt-in interpretation. Under this same phrase, the residual four-year federal statute of limitations does not apply when private actions are being asserted in Texas courts; rather, Texas limitations law applies. Under this law, the trial court correctly granted Chick-Fil-A summary judgment because the summary-judgment evidence proved as a matter of law that Chick-Fil-A did not send any allegedly unsolicited fax advertisement to any of the Recipients within the two-year period before the Recipients sued Chick-Fil-A in this case. However, the trial court erred in granting summary judgment in favor of GTE Mobilnet based on limitations. The trial court also erred by impliedly finding the TCPA applies only to interstate fax advertisements and by impliedly granting summary judgment based on the Advertisers' constitutional arguments. There is a genuine issue of material fact as to whether GTE Mobilnet sent unsolicited fax advertisements to appellants Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. The trial court properly granted summary judgment regarding the Recipients' common-law claims. This court has no jurisdiction to review the trial court's denial of the Recipients' motion for partial summary judgment.

Because the trial court correctly granted summary judgment as to the Recipients' common-law claims, all of their claims against appellee Chick-Fil-A, Inc., and the claims

of The Chair King, Inc., Chair King, S.A., Inc., M.E. Ford and Associates, Vantage Shoe Warehouse, Inc., Counselor Systems, Inc., Pope and Booth, P.C., and Pope Escrow Company under the TCPA, we affirm these rulings. However, we reverse the trial court's judgment as to the TCPA claims of appellants Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. against appellee GTE Mobilnet, and we remand these claims for further proceedings consistent with this opinion. We order the Recipients to pay any costs of appeal that have been incurred by Chick-Fil-A. Based on our holdings, we find good cause to apportion the costs of appeal incurred by the Recipients and GTE Mobilnet equally between the Recipients and GTE Mobilnet. *See* Tex.R.App. P. 43.4. Therefore, for good cause and in the interest of justice, we order the Recipients and GTE Mobilnet each to pay one-half of the aggregate appellate costs incurred by these parties in this case.

Kem Thompson frost

Justice

APPENDIX C — EXCERPTS OF FINAL JUDGMENT AND ORDER IN THE DISTRICT COURT OF HARRIS COUNTY TEXAS 152ND JUDICIAL DISTRICT DATED MARCH 2, 2000

NO. 95-036004

THE CHAIR KING, INC., ET AL.

v.

CHEVROLET COUNTRY, INC, D/B/A CHEVY COUNTRY, ET AL.

Final Judgment and Order on Defendants' and Plaintiffs' Motions for Summary Judgment

The Court has considered the individual motions for summary judgment filed by Defendants in the above-captioned and numbered cause. After considering the pleadings, the motions, Plaintiffs' Consolidated Response to Defendants' Individual Motions for Summary Judgment, Defendants' replies, certain individual defendants' Supplemental Motions for Summary Judgment, all other briefing relating to the motions, the competent summary judgment evidence, and argument of counsel, the Court is of the opinion that these Defendants' motions should be in all things GRANTED.

The Court has also considered Plaintiffs' Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act (filed July 26, 1999) and Plaintiffs' Supplemental Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act (filed September 24,

1999), all of Defendants' responses (including any objections to Plaintiffs' summary judgment proof), Plaintiffs' replies, all other briefing relating to the motions, the pleadings, the summary judgment evidence, and argument of counsel. The Court is of the opinion that the Plaintiffs' motions should be DENIED.

Furthermore, the Court has reconsidered the Defendants' Joint Motion for Summary Judgment (filed June 29, 1998), the Supplement to Defendants' Joint Motion for Summary Judgment (filed February 26, 1999), Defendants Hartford Fire Insurance Company's, Federal Kemper Life Assurance Company's and Texas Insurance Brokers' Motion for Summary Judgment (filed June 29, 1998), and Defendants Hartford Fire Insurance Company's and Federal Kemper Life Assurance Company's Motion for Reconsideration of Order Denying the Insurance Defendants' Motion for Summary Judgment (filed May 5, 1999). Having reconsidered the foregoing motions, Plaintiffs' responses, Defendants' replies, all other briefing relating to the motions, the pleadings, the competent summary judgment evidence, and argument of counsel, the Court is now of the opinion that these motions should be GRANTED. It is, therefore,

ORDERED, ADJUDGED, and DECREED that the following Defendants' individual Motions for Summary Judgment are GRANTED:

* * *

7. **Chick-Fil-A**: Chick-Fil-A's Motion for Summary Judgment;

* * *

19. **GTE Mobilnet**: GTE Mobilnet of Houston, Inc.'s Motion for Summary Judgment and GTE Mobilnet of Houston, Inc.'s Supplemental Motion for Summary Judgment;

* * *

IT IS FURTHER ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act and Plaintiffs' Supplemental Motion for Partial Summary Judgment Under the Telephone Consumer Protection Act are hereby DENIED; that Defendants' Joint Motion for Summary Judgment filed on June 29, 1998 and Supplement to Defendants' Joint Motion for Summary Judgment (filed February 26, 1999) are GRANTED; that Defendants Hartford Fire Insurance Company's, Federal Kemper Life Assurance Company's, and Texas Insurance Broker's Motion for Summary Judgment is GRANTED; that all objections to the summary judgment evidence lodged by Plaintiffs or by any Defendant or Defendants are OVERRULED; and that any and all prior orders of this Court that are inconsistent with this Order, including but not limited to the Order signed March 31, 1999 denying the Insurance Defendants' Motion for Summary Judgment and the Order signed April 12, 1999 denying Defendants' Joint Motion for Summary Judgment, are hereby VACATED and are null and void.

Appendix C

All expenses, court costs and attorney's fees are to be born by the party incurring the same. Consequently, all requests for expenses, court costs, and attorney's fees by any party in a motion encompassed by this Order and Final Judgment are hereby expressly DENIED.

All requests for sanctions or attorney's fees by any party in a motion encompassed by this Final Judgment and Order is hereby expressly DENIED.

All relief not expressly granted in this Final Judgment and Order is DENIED.

Signed this _____ day of March 7, 2000.

_____

Honorable Harvey Brown
Judge Presiding

FILED
MAY 25 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 05-1409

IN THE

Supreme Court of the United States

JEROME KOSOY, M.D., *et al.*,

Petitioners,

v.

GTE MOBILNET and CHICK-FIL-A, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS SUPREME COURT

BRIEF IN OPPOSITION OF CHICK-FIL-A, INC. AND GTE MOBILNET OF HOUSTON, INC.

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the Texas Supreme Court correctly read 47 U.S.C. § 227(b)(3)—which specifies just one of the means of enforcing the prohibitions under the Telephone Consumer Protection Act ("TCPA")—as enabling States to decide whether to permit private rights of action to be brought in their courts for the vast number of alleged unsolicited faxes received by Americans every year.

2. Whether, in interpreting the TCPA and harmonizing it with 28 U.S.C. § 1658, the Texas Court of Appeals correctly concluded that private TCPA claims, which Congress intended be brought in state court, are subject to state statutes of limitations.

PARTIES TO THE PROCEEDING

Petitioners Jerome Kosoy, M.D., Beautique, Inc., Discovery Services of Texas, Inc., and Jeffrey K. Musker, D.C. (collectively "Petitioners"), self-defined as the "Chair King," Pet. 5 n.2, were petitioners and respondents in cross-petitions below. Respondents GTE Mobilnet of Houston, Inc. ("GTE") and Chick-Fil-A, Inc. ("Chick-Fil-A") (collectively "Respondents") were also petitioners and respondents below. Pet. 4a.

RULE 29.6 DISCLOSURE

1. Pursuant to Supreme Court Rule 29.6, Respondent Chick-Fil-A states that it has no parent companies and no publicly held corporation owns 10% or more of the stock of Chick-Fil-A, Inc.

2. Petitioners improperly named "GTE Mobilnet of Houston, Inc." below. They presumably intended to name GTE Wireless of Houston, LLC, which merged into San Antonio MTA, L.P. in 2002. San Antonio MTA, L.P. is a partnership of Verizon Wireless Texas, LLC, Verizon Wireless Personal Communications LP, and TU AcquisitionCo LLC. Verizon Wireless Texas, LLC is wholly owned by Verizon Wireless Personal Communications LP. Verizon Wireless Personal Communications LP is a partnership of TU AcquisitionCo LLC and Verizon Wireless South Area LLC, both of which are wholly owned by Cellco Partnership.

Cellco Partnership d/b/a Verizon Wireless ("Cellco") is a Delaware general partnership with debt in the hands of the public. Cellco has seven partners in total. Five of the partners, representing 55% of the interest in Cellco, are ultimately owned by Verizon Communications Inc. ("Verizon"), which is a publicly held company. These partners are: Bell Atlantic Cellular Holdings, L.P.; NYNEX PCS Inc.; PCSCO Partnership; GTE Wireless Incorporated; and GTE Wireless of Ohio Incorporated (collectively, the "Verizon Partners"). None of the Verizon Partners is publicly held. Two of the partners, representing 45% of the interest in Cellco, are ultimately owned by Vodafone Group Plc ("Vodafone"), which is a publicly held company. These partners are: PCS Nucleus, L.P. and JV PartnerCo, LLC (collectively, the "Vodafone Partners"). None of the Vodafone partners is publicly held.

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